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*6th Edition*

**SELECT CASES**  
**AND**  
**OTHER AUTHORITIES**  
**ON THE LAW OF**  
**PRIVATE CORPORATIONS**

**BY**  
**EDWARD H. WARREN**  
**PROFESSOR OF LAW IN HARVARD UNIVERSITY**

**CAMBRIDGE**  
**PUBLISHED BY THE EDITOR**  
**1909**

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**BY EDWARD H. WARREN**

## PREFACE.

THIS book is intended as a successor to the Cases on Private Corporations, published by Judge Jeremiah Smith, the first edition of which appeared in 1897, and the second in 1902. With the abounding generosity characteristic of him, Judge Smith has allowed me to make any use I pleased of the matter contained in his book, and a large number of the cases in his book are here reproduced. It is a pleasure to make public acknowledgment of my indebtedness to him.

E. H. W.

CAMBRIDGE, July, 1900.



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THE DISTINCTION BETWEEN A CORPORATION AND A PARTNERSHIP. HEREIN OF A JOINT-STOCK COMPANY.

### LIVERPOOL, &c. INSURANCE CO. v. MASSACHUSETTS.

1870. 10 Wallace, U. S. 566.<sup>1</sup>

ERROR to the Supreme Court of Massachusetts. Bill in equity by State of Massachusetts to collect a tax, and to restrain company from doing further business till the tax was paid.

One question raised in this case was, whether the above Insurance Company is a corporation within the meaning of the Massachusetts Statute imposing upon each fire, &c. insurance company "incorporated or associated under the laws of any government or State other than one of the United States, a tax of 4 per cent upon all premiums charged or received on contracts made in this Commonwealth for insurance of property." The facts as to the nature of the company are sufficiently stated in the opinion.

The Supreme Court of Massachusetts decided that the company was liable to the tax. 100 Mass. 531 [Oliver v. Liverpool, &c. Ins. Co.].

B. R. Curtis and J. G. Abbott, for insurance company.

Charles Allen, Attorney-General of Massachusetts, for State.

MR. JUSTICE MILLER. . . . . These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — *See* *infra*

145 5 292; 160 5 636; 94 7 616, 90 7 616, 600, 86 7 587, 89, 595, 79 3674  
 65 7 154, 38 3 575, 579; 63 7 63; 178 25 401; 172 25 259, 264, 141 25 59.  
 119 25 118.

94 7 616. An act. L. 42 may by treaty adjust upon each cond. make that such a corp. the act does not in terms declare it corp. etc. Hence 1101. Wherefore of principal attribute, a corp. which is not a corporation is sufficient that unless clearly appears 57 Cal. 100

% 7000- suit. O is uninc. while alleg<sup>d</sup> they are not. ~~as a corp~~ - tell suits for actions as if they were possible entities, as corp. are for subpoena issues vs. Rem as such. The too plain many arg that they cannot be so sued. The nt to sue the sued is a corp. franch must be granted by leg. vol. ass<sup>ns</sup> of possess<sup>rs</sup> & cures ment<sup>s</sup> in Liver<sup>pool</sup> Mass.

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

Test. Attributes  
a corp. It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit, which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

Not created but  
recognized 4. Its existence as an entity apart from the shareholders is recognized by the act of Parliament, which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half-century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, &c., and the demand for the use of corporate powers in combining the capital and the energy required to conduct these large operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized, and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the States of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the States of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed that in all the States the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legis-

lative ratification as is given by the acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So also it is said that the fact that there is no provision either in the deed of settlement or the act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

MR. JUSTICE BRADLEY. Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a

1st as a Not a corp: under the 1st ch.

2d Not a corp: can sue in artificial name.

3d Parl declares should be a corp.

for

corporation. I think it is one of those special partnerships which are called joint-stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the States from imposing taxes or license laws upon either British corporations or joint-stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares.

*Judgment affirmed.*

*Pres. titl. Act Cal. 1911. 39 Reg. x. index - p. 18. "Term Corp. when used in this act incl. under a Corp, a company, an ass<sup>y</sup> & joint stock ass<sup>y</sup>"*

THOMAS v. DAKIN.

1839. 22 Wendell, 9.<sup>1</sup>

*Pres. a bk. pres.  
as Pres on b. & bk  
& for debt due & bk*

In the Supreme Court of New York. Action brought by plaintiff Thomas as president of Bank of Central New York, an association formed under the General Banking Act of April 18, 1838, to recover several demands alleged to be due to the institution. The declaration alleged the indebtedness to be to the bank, and the promises to have been made to the bank; concluding to the damage of the bank of \$10,000; and, therefore, the said plaintiff, as president of the Bank of Central New York, brings suit, &c.

*Demurrer - Pres  
has no auth. for*

Demurrer to declaration; assigning, in substance, the following special causes:—

*Bk. n. incorp<sup>d</sup> :  
act unkn & n  
prop passed*

1. Plaintiff Thomas has no cause of action.
2. No authority exists in law for plaintiff to sue on behalf of the bank, or upon promises made to the bank. *cf. v. 3 6*
3. No association of persons not incorporated are entitled by law to bring an action in the name of their president, but only in their individual names.
4. The General Banking Act of 1838, so far as it purports to authorize this suit, is unconstitutional; and also is void because it did not receive the assent of two-thirds of all the members of the legislature.

The Constitution of New York, article 7, section 9, is as follows: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill . . . creating, continuing, altering, or renewing any body politic or corporate."

<sup>1</sup> Statement abridged from facts stated by reporter and from facts stated in the opinions. The arguments are omitted; also the greater part of the opinions. —Ed.

The provisions of the General Banking Act of 1838 are sufficiently stated in the opinion of NELSON, C. J.

*C. P. Kirkland, and S. A. Foote, for plaintiffs.*

*Ward Hunt, for defendant.*

NELSON, C. J. . . . Are these associations corporations? In order to determine this question, we must first ascertain the properties essential to constitute a corporate body, and compare them with those conferred upon the associations; for if they exist in common, or substantially correspond, the answer will be in the affirmative. A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term *corporation* in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms. It has been well said by learned expounders that a corporation aggregate is an artificial body of men, composed of divers individuals, the ligaments of which body are the franchises and liberties bestowed upon it, which bind and unite all into one, and in which consists the whole frame and essence of the corporation. The "franchises and liberties," or, in more modern language, and as more strictly applicable to private corporations, the *powers and faculties*, which are usually specified as creating corporate existence, are: 1. The capacity of perpetual succession; 2. The power to sue and be sued, and to grant and receive in its corporate name; 3. To purchase and hold real and personal estate; 4. To have a common seal; and 5. To make by-laws. These *indicia* were given by judges and elementary writers at a very early day: since which time the institutions have greatly multiplied, their practical operation and use have been thoroughly tested, and their peculiar and essential properties much better understood. Any one comprehending the scope and purpose of them at this day will not fail to perceive that some of the powers above specified are of trifling importance, while others are wholly unessential. For instance, the power to purchase and hold real estate is no otherwise essential than to afford a place of business; and the right to use a *common seal*, or to *make by-laws*, may be dispensed with altogether. For as to the one, it is now well settled that corporations may contract by resolution, or through agents, without seal; and as to the other, the power is unnecessary, in all cases where the charter sufficiently provides for the government of the body. The distinguishing feature, far above all others, is the capacity conferred, by which a perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act in fulfilment of the objects of the association as a single individual. In this way a legal existence, a body corporate, an artificial being, is constituted; the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in affecting it, the operation is conducted with the simplicity and individuality of a natural

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person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential, are those which are indispensable to mould the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, this legal being created, the powers and faculties that may be conferred are various, — limited or enlarged at the discretion of the legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity: 1. To have a perpetual succession under a special name, and in an artificial form; 2. To take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and 3. To receive and enjoy in common, grants of privileges and immunities.

We will now endeavor to ascertain with exactness the powers and attributes conferred upon these associations by virtue of the statute. The first fourteen sections (1 to 14) prescribe the duties of the comptroller in furnishing notes for circulation, taking the required securities, &c. The 15th provides that any number of persons may associate to establish offices of discount, deposit, and circulation. The 16th, that they shall make and file a certificate, specifying: 1. The *name* to be used in the business; 2. The *place* where the business shall be carried on; 3. The *amount* of capital stock, and number of shares into which divided; 4. The *names of the shareholders*; 5. The *duration* of the association. The 18th confers upon the persons thus associating the most ample powers for carrying on banking operations, together with the right "to exercise such incidental powers as shall be necessary to carry on such business;" also to choose a president, vice-president, cashier, and such other officers and agents as may be necessary. By the 21st and 22d sections, contracts, notes, bills, &c., shall be signed by the president and cashier; and all suits, actions, &c., are to be brought in the name of, and also against the president for the time being; and not to abate by his *death, resignation, or removal*, but to be continued in the name of the successor. 24th section: The association may purchase and hold real estate, &c., the conveyance to be made to the president, or such other officer as shall be designated, who may sell and convey the same free from any claim against shareholders. 19th section: The shares of capital stock to be deemed personal property, transferable on the books of the association; and every person becoming a shareholder by such transfer, shall succeed to all the rights and liabilities of the prior holder. 23d section: No shareholder to be personally liable; and the association is not to be dissolved by the *death or insanity* of any shareholder.

1. Upon a perusal of these provisions, it will appear that the association acquires the power to raise and hold for common use any given amount of capital stock for banking purposes, which, when subscribed,

is made personal property, and the several shares transferable the same and with like effect as in case of corporate stock; to assume a common name under which to manage all the affairs of the association; to choose all officers and agents that may be necessary for the purpose, and remove and appoint them at pleasure. It will hence be seen, that although the association may be composed of a number of different persons, holding an interest in the capital stock, its operations are so arranged that they do not appear in conducting its affairs; all are so bound together, so moulded into one, as to constitute but a single body, represented by a common name, or names (the knot of the combination), and in which all the business of the institution is conducted by common agents. In this way it purchases and holds real and personal property, contracts obligations, discounts bills, notes, and other evidences of debt, receives deposits, buys gold and silver bullion, bills of exchange, &c., loans money, sues and is sued, &c. It is true some portion of the business is conducted in the assumed name, and some in the name of the president for the time being; but this in no manner changes the character of the body. A corporation may have more than one name; it may have one in which to contract, grant, &c., and another in which to sue and be sued; so it may be known by two different names, and may sue and be sued in either; and the name of the president, his official name, or any other, will answer every purpose. 2 Bacon's Abr. 5; 2 Salk. 451; 2 *Id.* 287; *Ld. Raym.* 158, 680. The only material circumstance is, a name, or names, of some kind, in which all the affairs of the company may be conducted. So much, and no more, is essential to give simplicity and effect to the operation. An artificial being is thus plainly created, capable of receiving all the ample powers and privileges conferred upon the associations, and of managing their diversified concerns in an individual capacity. All business is to be conducted in a common or proper name.

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2. This artificial being possesses the powers of perpetual succession. Neither *sale* of shares or *death* of shareholders affect it; if one should sell his interest, or die, the purchaser or representative, by operation of law, immediately takes his place. § 19. Nor can the insanity of a member work a dissolution. *Id.* Officers and agents for conducting the business of the association are secured. In case of vacancy, by death or otherwise, the place may at once be filled. § 18. For the entire duration, therefore, of the association, and which may be without limit, § 16, *sub.* 5, the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable. § 23. Then, as to the powers conferred, without again specially recurring to them, it will be seen at once that the associations possess all that are deemed essential, according to the most approved authorities, to constitute a corporate body. They have a capacity: 1. To have perpetual succession under a common name, and in an artificial

form; 2. To take and grant property, contract obligations, to sue and be sued by its corporate name, in the same manner as an individual; 3. To receive grants of privileges and immunities, and to enjoy them in common. All these are expressly granted, and many more, besides the general sweeping clause, "*to exercise such incidental powers as shall be necessary to carry on such business*" (meaning the business of banking), under which even the seal and right to make by-laws are clearly embraced, if essential in conducting the affairs of the institution.

[After considering other questions, the learned judge concludes as follows:—]

Upon the whole, I am of opinion: 1. That these associations are corporations; 2. That the legislature possesses no power to pass a general law like the one under consideration by a *majority bill*; and 3. That they may pass it by two-thirds of the members elected.

The plaintiff is therefore entitled to judgment on the demurrer, with leave to amend on the usual terms. *Judgment for plaintiff.*

### ANDREWS BROS. CO. v. YOUNGSTOWN COKE CO., Limited.

1898. 58 U. S. Appeals, 444.<sup>1</sup>

ERROR to the U. S. Circuit Court for the Eastern Division of the Northern District of Ohio.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

Action by Youngstown Coke Co., Limited, against Andrews Bros. Co., an Ohio corporation. Judgment below for the original plaintiffs.

*Thomas W. Sanderson*, for plaintiff in error.

*John G. White* (*Homer E. Stewart*, *James W. Stewart*, and *White, Johnson, McCaslin & Cannon* were on the brief), for defendant in error.

LURTON, Circuit Judge. The first and principal question is whether the circuit court had jurisdiction. The plaintiff is described in its original petition as "a limited partnership association, duly organized and existing under and by virtue of the laws of the state of Pennsylvania, of which state it is a citizen." This was perhaps an insufficient statement of its corporate character, under *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, and *Carnegie, Phipps & Co. v. Hulbert*, 3 C. C. A. 391, 53 Fed. 10. To meet this difficulty, an amended petition was filed, in which it was averred that the plaintiff was a corporation under the laws of Pennsylvania and a citizen of that state. The defendant in an amended answer, and by way of abatement, admits that the plaintiff company was created and organized under the Pennsylvania act of June 2, 1874, but denies that it thereby became either a

<sup>1</sup> Statement abridged. Portions of opinion omitted. So much of the opinion as is given is reprinted from 86 Federal Reporter, 586 *et seq.*—Ed.

corporation or a citizen of said state, within the meaning and effect of the statutes of the United States, requiring diversity of citizenship to give jurisdiction to a United States court.

The act of June 2, 1874 [as amended], under which the defendant in error was organized, is in 17 sections. The first provides that three or more persons desiring to organize under the act may do so by preparing, signing, and acknowledging a statement in writing which shall set forth the amount of capital subscribed for by each; the total amount of capital, and when and how to be paid; the character of the business and location of same; the name of the association, with the word "Limited" added thereto as part of same; the duration of the association, which shall not exceed 20 years; and the names of the officers selected in conformity with the act. The second section provides that the members of the association shall not be liable for the debts or engagements of the company beyond their unpaid subscriptions to the capital. *Its liab'y* The fourth section provides that interests in such associations shall be personal estates, and may be transferred, given, bequeathed, distributed, sold, or assigned under such rules and regulations as shall be adopted from time to time — "by a vote of a majority of the members in number and value of their interests; and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. *diligent pers* And any change of ownership, whether by sale, death, bankruptcy or otherwise, which occurs in the absence of any rules and regulations of such association regulating such transfer, and which is not followed by election to membership in such associations, shall entitle the owner or transferee only to the value of the interest so acquired at the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement, at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisal shall be subject to the approval of said court."

The fifth section provides for a board of managers, who shall be not less than three nor more than five, one of whom shall be chairman, one the treasurer, and one the secretary. This section also provides that "No debt shall be contracted or liability incurred for such association, except by one or more of the managers, and no liability greater than five hundred dollars, except against the person incurring it, shall bind the association, unless reduced to writing and signed by at least two managers."

The sixth and seventh sections provide for distribution of profits through dividends, such dividends not to impair capital, and that it shall be unlawful to lend its credit, name, or capital to any member,

The most that can be said of this decision is that the court declined to classify these companies with ordinary corporations, and contented itself with giving it its statutory designation. We have already seen by the Pennsylvania cases cited that that court had time and again held these companies to have the very attributes which enable us to distinguish a corporation from a mere partnership. The fact that these companies were not *called* corporations in the act of 1874, and that they possessed this *dilectus personarum*, has led to some confusion of terminology in the effort to describe them.

[After quoting from various Pennsylvania decisions.]

These decisions are not overruled or criticised in *Carter v. Oil Co.*, heretofore cited. We do not therefore agree with counsel for plaintiff in error that the Supreme Court of Pennsylvania has determined that such associations are not corporations; on the contrary, the corporate character of the organization is most distinctly recognized, though distinguished from the ordinary corporation provided for by other general statutes. "A new artificial person," organized under a statute, and empowered thereby to contract, hold, and convey property, sue and be sued, as such, is a corporation, and can be nothing else. In addition to the recognition of these associations as corporations of a peculiar character by the Pennsylvania court, we may add the pregnant circumstance that section 13 of article 16 of the state constitution provides as follows:—

"The term 'corporations,' as used in this article, shall be construed to include all joint-stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships."

Article 16 is devoted to the subject of private corporations and their regulation.

But does the existence of the *dilectus personarum* take from the body possessing it the character of a corporation, if it possesses those attributes which, by general consent, distinguish a corporation from a mere voluntary association? The general and well-settled rule is that, in the absence of statutory authority, a corporation may not make the transfer of shares dependent upon the discretion of the corporation, its officers or agents. They may by reasonable rule regulate such transfer, but they cannot prohibit. Mor. Priv. Corp. §§ 164, 165. But that this power may be conferred by the charter is equally well settled. Id., and authorities cited; Lowell, Stocks, § 31. This privilege of the *dilectus personarum*, while unusual in corporations for profit, is a very common provision in the charters of companies not for profits, such as clubs, boards of trade, fraternal societies, educational and charitable associations. Joint-stock companies have no invariable character. Sometimes they are incorporated, and sometimes they are not. The test is the attributes conferred by the statute under which they are organized. Mor. Priv. Corp. § 6. Certain express companies, widely known in this country as joint-stock com-

panies, have been held not to be corporations, within the meaning of local taxing laws.

The case of *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96, is interesting as showing the history and legislative origin of certain of these companies. The case only involved the question as to whether there was a legislative or practical distinction between joint-stock associations and corporations organized under the law of New York, and whether the capital of a joint-stock company was taxable under a New York statute, taxing the capital stock of corporations. The court refers to *People v. Wemple*, 117 N. Y. 136, 22 N. E. 1046, and says that case "shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations until the difference, *if there be one, is obscure, elusive, and difficult to see and describe.*" (The italics are ours.)

In endeavoring to discover whether any difference remained, the New York court, speaking through Finch, J., said :—

"But I think there was an original and inherent difference between the corporate and joint-stock companies known to our law which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical and well supported by authority. It is that the creation of the corporation merges in the artificial body, and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in *Supervisors of Niagara v. People*, 7 Hill, 512, and in *Gifford v. Livingston*, 2 Denio, 380, by the statement that the corporators lost their individuality, and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined on behalf of the respondents to be an 'artificial person, created by the sovereign from natural persons, and in which artificial person the natural persons of which it is composed become merged and nonexistent.' I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted if it successfully bears some sufficient test. In putting it on trial, we may take the nature of the individual liability of the corporators on the one hand, and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character. It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the mem-

bers from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing, by the intervention of an express command, the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. . . . Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. . . . We may thus see upon what the legislative intent to preserve them as separate and distinct is founded, and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new or retention of the old liability by an affirmative enactment, which avoids the inherent effect of the corporate creation. In the other the common-law liability remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it. The debt of the corporation is its debt, and not that of its members. The debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the liability of its corporators. The creation of the stock company leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of individuals; the other from the sovereignty of the state. The two are alike, but not the same. More or less, they crowd upon and overlap each other, but without losing their identity; and so, while we cannot say that the joint-stock company is a corporation, we can say, as we did say in *Van Aerman v. Bleistein*, 102 N. Y. 360, 7 N. E. 537, that a joint-stock company is a partnership, with some of the powers of a corporation. Beyond that we do not think it is our duty to go."

If the nonliability of the members for the collection of debts be in fact a test of a corporation, then these Pennsylvania companies are clearly corporations under this authority. But we cannot be supposed to concede this. In *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566-575, the fact of the liability for company debts of the members of the Liverpool Insurance Company was held to be no sufficient test of the corporate character of that joint-stock association. Justice Miller, as to this, said:

"To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But, however the law on this subject may be in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corpora-

tions of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain."

The Massachusetts court is cited as holding that these Pennsylvania associations are not corporations, and could not, therefore, be sued in Massachusetts as such. *Edwards v. Gasoline Works*, 168 Mass. 564, 47 N. E. 502. The case does so hold. But the decision is expressly rested upon the earlier Massachusetts cases holding that joint-stock companies organized under the law of that State were mere partnerships. *Tappan v. Bailey*, 4 Metc. (Mass.) 529; *Tyrrell v. Washburn*, 6 Allen, 466. "If," says Lathrop, J., delivering the opinion of the court, "the question were an open one in this commonwealth, it might well be held that such an association could be considered to have so many of the characteristics of a corporation that it might be treated as one." The court in that case express their unwillingness to adopt the views of the Supreme Court of the United States in *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, and say that their own decision, reported in *Oliver v. Insurance Co.*, 100 Mass. 531, and affirmed in that opinion, was rested upon the ground stated by Justice Bradley in his dissenting opinion. We have neither the disposition nor the freedom of the Massachusetts court in respect to the opinion of the Supreme Court in *Liverpool Ins. Co. v. Massachusetts*. The Youngstown Coke Company presents many more of the characteristic features of a corporation than did the Liverpool Insurance Company, and that case is an authority most strongly supporting our conclusion that it is a corporation. The same conclusion was reached in regard to another one of these Pennsylvania associations by Judge Lacombe, in *Bushnell v. Park Bros. & Co.*, 46 Fed. 209. That case was subsequently affirmed by the Court of Appeals, in 9 C. C. A. 138, 60 Fed. 583, though this question seems to have been abandoned by the plaintiff in error, against whose protest the case had been removed from the state court. Our conclusion, therefore, is that the Youngstown Coke Company is a corporation and a citizen of Pennsylvania, within the meaning of the jurisdictional requirement in respect to diversity of citizenship.

Judgment affirmed.

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## GREAT SOUTHERN FIRE PROOF HOTEL CO. v. JONES.

1900. 177 U. S. 449.<sup>1</sup>

JONES & Co. brought a bill in the U. S. Circuit Court for Ohio, against an Ohio corporation and various other defendants. The bill describes the plaintiffs as "members of the limited partnership association doing business under the firm name and style of Jones & Laughlins, Limited, which said association is a limited partnership association, organized under an act of the General Assembly of Pennsylvania, approved June 23d [2d], 1874, entitled 'An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances,' " . . . and which association is "a citizen of the State of Pennsylvania."

The claim of Jones & Co. was founded on the mechanics' lien statute of Ohio. The Hotel Company demurred to the bill; contending that the said statute was unconstitutional. After a decision in favor of Jones & Co. in the U. S. Circuit Court of Appeals, the Hotel Company brought the case to the U. S. Supreme Court on a writ of certiorari.

Upon the argument in the Supreme Court, that court suggested the question (not raised by counsel, nor argued in the court below), whether the case as presented by the record was one of which the U. S. Circuit Court could take cognizance by reason of diversity of citizenship.

*John E. Sater and D. F. Pugh*, for petitioner.

*Talfourd P. Linn and Louis G. Addison*, for respondents.

HARLAN, J. . . . We are of opinion that the plaintiff as a limited partnership association was not entitled to invoke the jurisdiction of the Circuit Court. It was not alleged to be, nor could it have alleged that it was, a corporation in virtue of the statute of Pennsylvania under which, according to the averments of the bill, it was organized.

It has been suggested that the plaintiffs are entitled to sue, and may be sued, by their association name. . . . But the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation.

[As to Const. Pa. Art. XVI. Sect. 13.] The only effect of that clause is to place the joint-stock companies or associations referred to under

<sup>1</sup> Statement abridged. Portions of opinion omitted. — Ed.



## PEOPLE EX REL. WINCHESTER v. COLEMAN.

1892. 133 N. Y. 279.

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made February 13, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, vacating an assessment.

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This was a proceeding by certiorari to review the action of the commissioners of taxes and assessments of the city of New York, in imposing an assessment upon the capital stock of the National Express Company, a joint-stock company, of which the relator is treasurer for the year 1888.

*George S. Coleman*, for appellants.

*James C. Carter*, for respondent.

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FINCH, J. The relator was taxed upon its capital on the ground that it had become a corporation within the meaning of the provision of the Revised Statutes which enacts that "all monied or stock corporations deriving an income or profit from their capital or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." (1 R. S. title 4, chap. 13, part 1.) The company was formed as a joint-stock company or association in 1853 by a written agreement of eight individuals with each other, the whole force and effect of which, in constituting and creating the organization, rested upon the common-law rights of the individuals and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement and depended in no respect upon the grant or authority of the state. It was entered into under no statutory license or permission, neither accepting nor designed to accept any franchise from the sovereign, but founded wholly upon the individual rights of the associates to join their capital and enterprise in a relation similar to that of a partnership. A few years earlier the legislature had explicitly recognized the existence and validity of such organizations, founded upon contract and evolved from the common-law rights of the citizens. (Laws of 1849, chap. 258.) That act provided that any joint-stock company or association, which consisted of seven or more members, might sue or be sued in the name of its president or treasurer, and with the same force and effect, so far as the joint property and rights were concerned, as if the suit should be prosecuted in the names of the associates. But the act explicitly disclaimed any purpose of converting the joint-stock associations recognized as existing, into corporations by a section prohibiting any such construction. (§ 5.) In 1851 the act was amended in its form and application, but in no respect material to the present inquiry. There is no doubt, therefore, that when the company was formed and went into operation the law recognized a distinction and substantial difference between  
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joint-stock companies and corporations and never confused one with the other, and that the existing statute which taxed the capital of corporations had no reference to or operation upon joint-stock companies or associations.

But two things have since occurred. The legislature, while steadily preserving the distinction of names, has with equal persistence confused the things by obliterating substantial and characteristic marks of difference, until it is now claimed that the joint-stock associations have grown into and become corporations by force of the continued bestowal upon them of corporate attributes. It is said, and very probably correctly said, that the legislature may create a corporation, without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes, and the cases of banking associations are referred to as instances of actual occurrence. (*Thomas v. Dakin*, 22 Wend. 9; *Bank of Watertown v. Watertown*, 25 Id. 686; *People v. Niagara*, 4 Hill, 20.) It is added that such result may happen even without the legislative intent, and because the gift of corporate powers and attributes is tantamount to a corporate creation. It is then asserted that a series of statutes, beginning with the act of 1849, has ended in the gift to joint-stock associations of every essential attribute possessed by and characteristic of corporations (Laws of 1853, chap. 153, Laws of 1854, chap. 245, Laws of 1867, chap. 289); that the lines of distinction between the two, however far apart in the beginning, have steadily converged until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated, and no reason remains why joint-stock associations should not be in all respects treated and regarded as corporations.

Some of this contention is true. The case of *People ex rel. Platt v. Wemple* (117 N. Y. 136) shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations, until the difference, if there be one, is obscure, elusive, and difficult to see and describe. And yet the truth remains that all along the line of legislation the distinctive names have been retained as indicative and representative of a difference in the organizations themselves. As recently as the acts of 1880 and 1881, which formed the subject of consideration in the *Wemple* case, the legislature, dealing with the subject of taxation and desiring to tax business and franchises, imposed the liability upon "every corporation, joint-stock company or association whatever now or hereafter incorporated or organized under any law of this State." It is significant that the words "or organized" were inserted by amendment, and evidently for the understood reason that joint-stock companies could not properly be said to be "incorporated," but might be correctly described as "organized" under the laws of the State. This persistent distinction in the language of the statutes I should not be inclined to disregard or treat as of no practical consequence, when seeking to arrive at the true intent and proper construction of the

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statute, even if I were unable to discover any practical or substantial difference between the two classes of organizations upon which it could rest, or out of which it grew, for the distinction so sedulously and persistently observed would strongly indicate the legislative intent, and so the correct construction.

But I think there was an original and inherent difference between the corporate and joint-stock companies known to our law which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical and well supported by authority. It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in *Supervisors of Niagara v. People* (7 Hill, 512), and in *Gifford v. Livingston* (2 Den. 380), by the statement that the corporators lost their individuality and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined on the part of the respondents to be "an artificial person created by the sovereign from natural persons and in which artificial person the natural persons of which it is composed become merged and non-existent." I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted if it successfully bears some sufficient test. In putting it on trial we may take the nature of the individual liability of the corporators on the one hand and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character.

It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing, by the intervention of an express command, the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are of course new statutory liabilities which never at common law rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability, as we had occasion to

show in *Rogers v. Decker* (131 N. Y. 490), but is retained by force of the express command of the statute and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily, these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liability arises after the usual remedies against the corporation have been exhausted. But where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common-law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities or a specific retention of old ones from the destruction which would otherwise follow. Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Those debts are their debts for which they must answer. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. The statute of 1853 did interfere with it. That act required in the first instance a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that act was modal, and determined the procedure. It suspended the common-law right, but recognized its existence. We so held in *Witherhead v. Allen* (4 Abb. Ct. App. Dec. 628), and at the same time said that the associations were not corporations but mere partnership concerns. Even that mode of procedure has been modified by the Code (§§ 1922, 1923), so that the creditor at his option may sue the associates without bringing his action against the president or treasurer. These last and quite recent enactments show that the legislative intent is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common-law liability of associates and not to substitute for it that of corporators; and preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one or destroy the boundaries which separate them. That intent, once clearly ascertained, determines the construction to be adopted, and may be the only reliable test in view of the power of the state to clothe one organization with all the attributes of the other. The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand corporations have been created with positive provisions retaining more or less the individual liability of the members, and on the other the joint-stock companies have been clothed with most of the corporate attributes, but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two.

We may thus see upon what the legislative intent to preserve them

as separate and distinct is founded and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new or retention of the old liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other, the common-law liability remains unchanged and unimpaired and needing no statutory intervention to preserve or restore it; the debt of the corporation is its debt and not that of its members, the debt of the joint-stock company is the debt of the associates however enforced; the creation of the corporation merges and drowns the liability of its corporators, the creation of the stock company leaves unharmed and unchanged the liability of the associates; the one derives its existence from the contract of individuals, the other from the sovereignty of the state. The two are alike but not the same. More or less, they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that the joint-stock company is a corporation, we can say as we did say in *Van Aernam v. Bleistein* (102 N. Y. 360), that a joint-stock company is a partnership with some of the powers of a corporation. Beyond that we do not think it is our duty to go.

The order should be affirmed.

All concur.

*Order affirmed.*

Code 283, 284

Joint Stock Co & phsp. Bullard v. Tunney 10 Cal 60  
417 Cal 2d 285 n. 4 Cal 2d 80, 314. 22 Cal 2d 471.

Dalmet: 2 Corp & phsp. corp + jt stock Co 13 & 14

Unlike a corp. a phys<sup>l</sup> cannot consist of a single member  
Legal persons can be classified as (a) Natural men (b) men groups.

CORPORATIONS SOLE: See *FWMalt* § 417 23 XVI 305  
Carr. Chap IV

## CHAPTER II.

CORPORATIONS SOLE.

simultaneous corp<sup>n</sup> - aggregate  
successors functioning - sole

1 Bl. Com. 469.

THE first division of corporation is into aggregate and sole. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue forever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation: so is a bishop: so are some deans, and prebendaries, distinct from their several chapters: and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a church. At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances: or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained that the parson, *quatenus* parson, shall never die, any more than the king: by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also.<sup>1</sup>

Permanence  
Success?

Personify g  
a man of office  
capacity of the  
right - his nat  
ural capacity

<sup>1</sup> Story, J., in *Terrett v. Taylor*, 9 Cranch (U. S.), 43, said, p. 46: At a very early period the religious establishment of England seems to have been adopted in the colony of Virginia; and, of course, the common law upon that subject, so far as it was applicable to the circumstances of that colony. The local division into parishes for ecclesiastical purposes can be very early traced; and the subsequent laws enacted for religious purposes evidently presuppose the existence of the Episcopal church with its general rights and authorities growing out of the common law. What those rights and authorities are, need not be minutely stated. It is sufficient that, among other things, the church was capable of receiving endowments of land, and that the minister of the parish was, during his incumbency, seised of the freehold of its inheritable property, as emphatically *persona ecclesiae*, and capable, as a sole corporation, of transmitting that inheritance to his successors.

94/159 - Can be created in Cal by § 602 C.C. Code

with - during death - incumbent by a new one - freehold is made by  
Corporation can't leave to exp 8 Mod 303-4 sue on the suit Grant m Corp 33  
Can't take first prop to be held in success 14 Q 253  
Chanc'd in part 6020.

5647

Lillehm



# CHAPTER III.

## "DISREGARDING THE CORPORATE FICTION."

### RUSSELL ET ALS., APPELLANTS v. TEMPLE ET AL., APPELLEES.

1798. *Supreme Court of Massachusetts.* 3 *Dane's Abridgment*, 108.

[PROBATE APPEAL.] In this case the heirs of Thomas Russell contended that his shares in Malden, Charles-river, Haverhill, Andover, and Merrimack bridges, in Middlesex canal, &c., ought to be considered as real estate, and his widow, afterwards married to Temple, ought to have only her dower for life in them. On the other hand, Temple and wife contended they were personal estate, and ought to be distributed as such, and she have one-third part forever. The strongest case among these, in favor of real estate, was the Middlesex canal, in which the corporation had a fee simple estate, or an estate forever, and a perpetual toll. By the statutes passed respecting this canal and real estate, the property therein was divided into 800 shares, and the shares in the canal, including the towing paths and wharves thereon, were made transferable and taxable as personal estate. This corporation also had power to hold real estate to the amount of £30,000, over and above the canal itself, and this appendant real estate was made taxable as real estate of the corporation in the several towns in which it lay.

It was argued (for the widow) that these shares were personal estate for two reasons:—

1st. Because these estates can only exist in the corporation, which alone can acquire it, alone be seized or possessed of it, alone pass it away, manage or repair it, and so must hold it entire; and that the corporation is a moral person to all the purposes of property. Its tenure is to their successors, or to their successors and assigns; these estates never can vest in or be divided among the individual members, to hold as tenants in common &c., in their private capacities. Only the corporation can forfeit the estate, and that only by forfeiting

ccc  
But the shares in the Corp. Stock of any corp. is not into the corp. itself. These are issued such &c. stock except as hereinafter provided (see Co's) are first prop. ... &c.

1872-73, 218. Act. common for sale, cert. shares. "The code provides a person  
 prop. is delivered at place or time or sale or agreement to sell  
 unless (C.C. § 1707...) The stock of Blue Jacket Mining Co was personal prop  
 & was in U.F. -- It was therefore to be delivered up for U.F.  
 RUSSELL v. TEMPLE. 25

their charter; and only the corporation can be taxed for it on common law principles; and on these can it alone be taken in execution for the debts of the corporation; and on a dissolution of the corporation, "its lands revert to the grantor, or his heirs, and the debts due to or from it are totally extinguished; so that the members of it cannot recover or be charged with them in their natural capacities." And a grant to a corporation can only be for its life or continuance. 2 Bl. Com. 484; 1 Lev. 239; 1 Bac. Abr. 510. The case of the *Royal Exchange Insurance Company v. Vaughan*, 1 Burr. 155, and Cowper, 79 to 86, *Gardner's Case*.

Second. Because the share is personal estate, though the corporation hold real estate; for the individual member has no estate, but only a right to such dividends as the corporation, from time to time, assign to him. He is unknown on the grants made to it, and he cannot grant any part of the estate; nor can he be taxed for it but by statute law; nor can any private member of a corporation be distrained for a public concern of it; his only remedy for his dividend is case in *assumpsit*, or an action on the case for a wrongful refusal or neglect to pay or allow him his part of the profits. 4 Wood's Con. 489, &c.; Cowp. 85; Imp. Modern Pleader, 88; 1 Vent. 351, *Dutch v. Warren*; 1 Stra. 406; same case, 2 Burr. 1011. So lands may be real estate in one, yet the trees or corn growing on them may be personal estate in another. *Lifford's Case*, 6 Co. 46 to 50; Imp. M. P. 167.

For the heirs it was urged that these shares were real estate, because it was said the estates were real in the corporations; annexed to the soil; and that if these estates in the corporations were real, the estates of the individual members in them followed their nature, and were real; and that the frequent declarations of the legislature declaring such shares personal estate, at least shew a doubt: that when one has a right to receive rent, he has only a right to receive a sum of money; yet it does not follow that his estate is not real estate, out of which his rent issues.

The judgment of the court was, that these shares were personal estate, and distribution was ordered accordingly. The principal reason of the decision appears to be, because the court considered that the individual member, or shareholder, had only a right of action for a sum of money, his part of the net profits, or dividends. And so the law has been held to be since this decision was made.

"A share is an int. legal or eq. interest in the corp. & Co. A share is personally  
 the corp. may own R.E. ... A sale of shares can't be deemed a sale of an int. in  
 goodwill & Co. w. meaning, a stat. which forbids any agree. to refrain  
 & exercise of a lawful trade or bus. except by a seller, goodwill; & consequently  
 & such a stat. a share whose personality is closely assoc'd w. goodwill, &  
 Co. & bus. cannot upon selling his int. in corp. agree with purchaser to re-  
 frain & engag. in same bus. & corp. -- A share is not a sum, & settled in trust  
 -- It is an int. measured by a sum, & made up of various rights contained  
 in C. includg. r. to a sum, & of more or less amt. of shares in actg. & bus.  
 in 175 Stat. & Co. but are personal chattels, personal prop. As a thing prop. from  
 would properly lie but an action ea in nature, from will.  
 1854-207: (1) 124/1202; (2) 1601; 16279-88; 16326-27; 16328-29; 16330-31; (4) 26 Oct 11; (5) 11 Apr 12

## WILLIAMSON v. SMOOT.

1819. 7 *Martin, Louisiana*, 31.

APPEAL from the court of the first district.

MATTHEWS, J., delivered the opinion of the court. The plaintiff having caused an attachment to be levied on the steamboat Alabama, the St. Stephens Steamboat Company intervened in their corporate capacity, and claimed her as their property. The intervening party are a body politic, created by an act of the legislature of the territory of Alabama, the capital stock of which is divided into shares of a certain amount, and Smoot the defendant owns ten of them, subscribed for by him.

The questions to be decided are: 1. Is it proper for our courts of justice to recognize, in their judicial proceedings, the company as a corporate body? 2. Can the shares or stock of any individual stockholder be legally attached?<sup>1</sup>

II. The existence of the claimants being recognized as a body corporate, and it being admitted that the boat attached belongs to them as a part of their common stock, it is clear that Smoot does not possess such certain and distinct individual property in it, as to make his interest attachable. The estate and rights of a corporation belong so completely to the body, that none of the individuals who compose it has any right of ownership in them, nor can dispose of any part of them. Civ. Code, 88, art. 11.

The court is of opinion that the district court erred in disallowing the claim of the company.

It is therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the attachment of the plaintiff and appellant be quashed, so far as it relates to the said steamboat the Alabama, and that she be released therefrom.

*Livingston*, for the plaintiffs.

*Duncan*, for the claimants.

<sup>1</sup> The opinion relating to Point I. is omitted. — Ed.

See 21/878-385 --- The bare fact that a man holds sh<sup>s</sup> in Corp. does not make a corp from him no legal title, & proper Corp. that remains in corp'n in sh<sup>s</sup> (e.g. many Cal. ca<sup>s</sup>). The shares simply represent the proportion to which respectively sh<sup>s</sup> who may (such at date) distrib<sup>n</sup> are severally entitled to distrib<sup>n</sup> of assets & corp. bus. --- & in final distrib<sup>n</sup>, estate & corp. ---

## 6 COOK v. CITY OF BURLINGTON.

1882. 59 Iowa, 251.

THE plaintiffs are the executors of the estate of James W. Grimes, deceased. They are residents of the city of Burlington, where the estate is situated. Part of the estate consists of shares of stock in the Dunleith and Dubuque Bridge Co., which is a corporation of that name, incorporated under the general incorporation laws of the State of Iowa, and having its principal place of business in Dubuque county. The corporation owns a bridge across the Mississippi River, from the city of Dubuque, Iowa, to the eastern shore of the river in the State of Illinois, and said bridge is all the tangible property owned by the corporation. The bridge was assessed for taxation at Dubuque, and the taxes were paid. The shares of stock in the bridge company held and owned by the estate of Grimes were also assessed for taxation for the same year at the city of Burlington. The plaintiffs claimed that the stock was not liable to taxation, and appealed from the board of equalization of the city of Burlington to the Circuit Court. Upon a trial in the Circuit Court it was held that the assessment of the stock was authorized by law, and plaintiffs appeal.

*Hedge and Blythe, Shiras, Van Duzee and Henderson*, for appellants.  
*C. L. Poor*, for appellee.

ROTHROCK, J. — The assessment of the bridge as the property of the corporation was authorized by law. *Appeal of The Des Moines Water Company*, 48 Iowa, 324. Whether the shares of stock can be legally assessed and taxed as the property of the stockholders for the same year for which the property of the corporation is assessed and taxed was not determined in that case. It was said, however, that "the statute provides that the stock of such corporations shall be assessed at its cash value. When assessed and taxed under the statute, stock must be taxed as the property of the respective owners, and there is no provision making the corporation liable therefor."

We have then the question in this case whether the shares of stock may be taxed in addition to the taxation of the property of the corporation.

And we may say, once for all, at the outset, that our views, as expressed in the case just cited, that the statute provides that the stock shall be assessed and taxed, remains unchanged. This conclusion is not founded upon any doubtful construction of the statute, but upon its plain, certain and unequivocal language and meaning. The statute imposing this burden upon the stock is found in section 813 of the Code, and is as follows: "Depreciated bank notes and the stock of corporations and companies shall be assessed at their cash value,\* \* \*."

It is idle to contend in the face of this plain and explicit language that the legislature has not required that stock in corporations shall be assessed, and the only question now for determination is, does the legislature have the power to determine that the property of a corporation and the stock shall both be taxed.

Counsel for appellants contend that no such power exists, because it is duplicate or double taxation of the same property, and it is insisted that "this court has over and over again declared that double taxation is forbidden by our Constitution." If this statement were correct, and we should concede that the question here presented were one of duplicate taxation, the case could easily and speedily be disposed of by a prompt reversal. But, while it is true that this court in *Tallman v. Butler County*, 12 Iowa, 534, said that it "is neither the policy nor the justice of the law to tolerate double taxation," and in *U. S. Express Co. v. Ellyson*, 28 Id., 378, that "double taxation would be so unjust as to excite disfavor of both courts and legislature," and in *McGregor's Executors v. Vanpel*, 24 Id., 436, that mortgages upon real estate should be held to be taxable "unless this will lead to double taxation," yet it never has been held in this State, that what is denominated duplicate taxation is in excess of the legislative power. The most that can be said of these utterances of this court is, that it should be held in disfavor by courts and legislatures.

In *Cooley on Taxation*, 165, it is said: "It has properly and justly been held that a construction of the laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute or by necessary implication."

Upon the question as to whether the imposition of taxes upon the property of a corporation and upon the shares of stock in the hands of stockholders, the general observations upon the subject of duplicate taxation found in *Cooley on Taxation*, page 159, seem to us to be appropriate to be here quoted. It is there said: "A system of indirect taxes, combined with a system of general taxation by value, must often have the effect to duplicate the burden upon some species of property or upon some persons, and the taxation of stockholders of a corporation and also of the corporation itself, must sometimes produce a like result. There is also, sometimes, what seems to be double taxation of the same property to two individuals, as where the purchaser of property on credit is taxed on its full value while the seller is taxed to the same amount on the debt \* \* \* . Now, whether there is injustice in the taxation, in every instance in which it can be shown that one individual, who has been directly taxed his due proportion, is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results."

It must be conceded that the taxation of the property of the cor-

poration and also of the stock bears no resemblance to taxing the same tract of land twice to the same person, nor once to A, and again to B. That would be a double taxation, which we suppose would not be allowable in any State in the Union. It would be a direct discrimination and inequality in the exercise of the taxing power, which would impose a greater burden upon one citizen than upon another upon the same kind of property. But the case at bar is quite different. The corporation is a person distinct from the stockholder. It is true, it is what is denominated an artificial person, and may be said to be ideal and intangible. But that it is a person in law is the first principle learned by the student in opening any book on corporations. Its stockholders are distinct and different persons. They are usually not liable for its debts, and have no right to the enjoyment or possession of its property during the period of its duration or until it be dissolved by some procedure known to the law. The stockholder is entitled to dividends upon his stock, if there be any dividends, and the value of his stock depends upon prospective dividends, and the dividends depend upon the net earnings of the corporation. If the bridge in this case be taxed, the tax must be paid from the income, and this reduces the value of the stock, so that there is no duplicate taxation, so far at least as the tax upon the bridge reduces the value of the stock.

In *McGregor's Executors v. Vanpel*, *supra*, this court held that a mortgage given to secure the payment of the purchase-money of the premises mortgaged is not exempt from taxation. In that case it is said that "a system of assessments operating with entire equality and with absolute justice is a desideratum in government yet unattained, and perhaps unattainable." And in *Finley v. Philadelphia*, 32 Pa. St., 381, it is said: "There is nothing poetical about tax laws, whenever they find property they claim contribution for its protection without any special respect to the owner or his occupation."

The best devised system of taxation based upon the values of property must, of necessity, produce unequal results, so long as the attempt is made to tax all property including real estate, personal chattels, and moneys and credits. One person will be taxed upon the real estate bought upon credit, and another upon the obligation which he holds for the purchase-money. And this must necessarily be so or there would be but little taxation upon credits, because, for the most part, they are either the representative of money or property of some kind held by another. If as is said in *Cooley on Taxation*, p. 100, "all the property in a town is sold on credit and the property is taxed to the purchasers, and the debts to sellers, it is manifest that the town taxes twice as much wealth as lies within its borders." And yet under the system of taxation adopted by the State of Iowa, it cannot be claimed that the assessor must inquire of the owner of promissory notes, or mortgages, whether they are credits for taxable property which has been sold by the holder of these credits.

In the case at bar the stockholders paid to the corporation a certain

Sp stock earns  
10% + 6% worth  
50% stock sells  
at 200. Prop tax  
51. Div reduced  
to 94.81.00  
sells at 180  
10% at 10%  
You still have  
double tax n. of  
the p.c. is double

sum of money. The corporation used this money in the construction of a toll-bridge from which the corporation derived an income. The agreement between the contracting parties is that the corporation is to manage and control the bridge, make the necessary repairs, and pay the taxes assessed against the bridge, and after deducting these legitimate and necessary expenses pay to the stockholder his proportionate share of the net earnings, and upon the dissolution of the corporation the stockholder is to be repaid his money advanced from the property belonging to the dead corporation. Now, suppose this very contract were made with a natural person instead of a corporation, and the stockholder or creditor should make a claim that the obligation held by him was not taxable. There would be no more grounds for such claim under our system of taxation than there would be for the claim that if A loans B \$100, which is invested in merchandise, the debt is not taxable because the merchandise is taxable.

These illustrations, it appears to us, demonstrate that if we were to determine that the legislature has no constitutional power to impose this tax upon the stockholder, it would open a door into a sea of trouble in the administration of the revenue laws of the State.

In disposing of this important question we have not reviewed the authorities cited by the respective counsel of the parties. It is sufficient to say that these views are supported by the very great majority of adjudged cases upon this subject. We think the Circuit Court correctly determined that the shares of stock are taxable. And if the public interests of this State require that either the property of a corporation of this character, or the stock therein be exempt from taxation, that relief must come from the law-making power. It will be understood that the decision in this case will have no application to capital stock in manufacturing companies. By chapter 57 of the laws of 1880 such stock is exempt from assessment and taxation.

*Affirmed.*

*Beale Fin Corp. §§ 469; 701; 732. Pol Code. 3607, 3608.*

*Amended State Const: § 14 of Art. XII & Chap 335 Stat. Cal p 530. 39th & 40th Sess: 6801 repeals License law 1905 & amendments above - p 2. 6615*

*161 Cal 204*

#### 4 JOHN FOSTER & SON LIMITED v. COMMISSIONERS OF INLAND REVENUE.

1893. *L. R.* (1894) 1 *Q. B.* 516.<sup>1</sup>

CASE stated by Commissioners of Inland Revenue.

The Stamp Act imposes an *ad valorem* duty "upon conveyance or transfer on sale of any property." The consideration, as appears from another clause of the Act, need not always be money, but may be stock or marketable securities. The Act provides that the term "conveyance on sale" includes every instrument "whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction."

Eight persons, who had for many years carried on business in partnership as John Foster & Son, being desirous that the firm should be reconstructed as a Limited Company (registered with limited liability under the Companies Acts), agreed to terminate their partnership, and to transfer all the firm property to a Limited Company, styled John Foster & Son Limited, to be formed of all the partners exclusively for the purpose of taking over the same subject to all the liabilities; the whole of the ordinary shares, preference shares, and debenture stock of the company to be allotted among the partners in proportion to their respective shares in the partnership estate. In accordance with this agreement, by deed of indenture between the eight persons who composed the partnership and the Limited Company, registered under the Companies Acts under the name of John Foster & Son Limited, all the partnership property was conveyed to the Limited Company.

The Commissioners assessed an *ad valorem* duty upon the deed, as coming under the head of a "conveyance or transfer on sale."

In the Queen's Bench Division, CAVE, J. held that the assessment was erroneous, and WRIGHT, J. took the opposite view. WRIGHT, J., withdrew his judgment, and the appeal from the Commissioners was allowed.

From this decision of the Divisional Court, the defendants appealed to the Court of Appeal.

*Sir Charles Russell*, A. G., and *Danckwerts* (*Sir John Rigby*, S. G., with them), for appellants.

*Finlay*, Q. C., and *A. R. Kirby*, for respondents. [Argument as condensed in 69 L. T. N. s. p. 817.]

In order to constitute a sale there must be two different parties capable of making an agreement, and there must be two different things, the property sold and the price given for it. In the present case there has merely been a re-arrangement of ownership. The parties remained the same, and nothing was parted with, and nothing was given. It

<sup>1</sup> Statement abridged. Opinions in Queen's Bench Division, and part of arguments omitted. — Ed.



was like a conveyance of property to trustees upon trust to carry on the business, and divide the proceeds arising from it amongst the conveying persons.

LINDLEY, L. J. I confess that, with great deference to CAVE, J., I cannot see the difficulty in this case.

The material sections of the Act of 1870 must first be considered. [The Lord Justice then read ss. 70 and 71 of the Stamp Act, 1870, and continued]: The importance of s. 71, to my mind, is this: it shews that there may be a conveyance on sale, although the consideration for it is not cash or money, but may include or consist of stock or marketable securities. The definition of "stock" and "marketable securities" will be found in s. 2. Then s. 78 imposes a stamp duty on conveyances not otherwise charged, and the schedule shews what the stamps are that are imposed upon conveyances that are charged. First we have "conveyance or transfer whether on sale or otherwise," of certain stocks and dividends. The present case does not come within that head. Then we have "conveyance or transfer on sale, of any property" . . . "where the amount or value of the consideration for the sale does not exceed £5." That fits in with ss. 70 and 71. Then we come to "Conveyance or transfer by way of security of any property or of any security;" and then we have "Conveyance or transfer of any kind not hereinbefore described." We must accordingly consider under which of these heads the particular deed in this case comes. It certainly does not come under the first, nor under "conveyance or transfer by way of security of any property," and the alternative is between "conveyance or transfer on sale" and "conveyance or transfer of any kind not hereinbefore described."

Now, the document in this case is an indenture made between eight gentlemen of the first eight parts, and "John Foster & Sons Limited (hereinafter called 'the company'), of the 9th part." Pausing there for a moment: although the persons of the first eight parts may be, and were members, and the only members, of John Foster & Co. Limited, John Foster & Co. Limited is not those eight individuals; John Foster & Co. Limited, is a corporation. We have accordingly two parties, one party consisting of several individuals, and the other party consisting of a corporation. Whether they are or are not the members, or the only members of the corporation, is wholly immaterial. The corporation is a totally different person from them in any capacity you choose to assign to them except a corporate one. [The Lord Justice then stated the recitals in and the operative part of the conveyances, and continued]: —

Then the parties of the first eight parts put their seals to the instrument, and the company puts its seal to it. Now, what is that instrument? It is certainly a conveyance of property; that is obvious. In order to amount to a conveyance of property there must be a person conveying and a person taking, and you have them both here. The persons conveying are the persons named in the first eight parts, and the persons taking are the corporation named in the ninth part.

Now, what is the consideration? The consideration for the transfer of this property is, I agree, not money, but it is stocks and securities, which for this purpose are to be regarded as equivalent to money by reason of s. 71 of the Act to which I have already alluded. Then what have we got? To sum it up shortly, it is a conveyance of property from one person to another, for money, or what is, according to the provisions of the statute, equivalent to money. What is that except a conveyance on sale? What else can you call it? It is certainly not a gift; it is not an exchange; it is not a partition; it is not a mortgage. I do not know what it is unless it is a conveyance on sale. I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money, or for the purposes of the Stamp Act, for stock or marketable securities.

But then it is argued that it is only a redistribution of property. I do not consider it a redistribution at all. It is an entire transfer of property from one set of people to another person altogether, and whether there are, as there may well be hereafter, additional persons taking shares in this company, is perfectly immaterial.

Again it is argued on behalf of the appellants that this instrument is in substance nothing more than a conveyance to a trustee to carry on the business in trust for the grantor. Just try that. Supposing there is a conveyance by half-a-dozen people, transferring their property to a trustee on trust to carry on the business for them, can you in any sense of the word, legal or business-like, or otherwise, call that trustee a buyer? There is no buying, there is no sale to him at all, nor is there any money, or stock, or securities, or anything else parted with by him. Then it was urged that these shares can derive no value unless the company gets this property transferred to them. That is possible enough. That is to say, in other words, that the shares in the company would be valueless unless the company had assets. Of course they would be, but that does not affect the question whether there is a sale or a conveyance or not. I think myself that CAVE, J., has attached too little importance to the fact that you have here a distinct seller, and a distinct buyer, and that in point of law it is immaterial that in the present case the buyer is a corporation which consists of the eight persons who formed, and who are, the partners. The appeal must be allowed.

KAY, L. J. I am of the same opinion. With deference to CAVE, J., it seems to me impossible to hold that this transaction was anything else than a conveyance on sale. As pointed out on the face of the statute, the consideration may be money or money's worth. Money's worth certainly is sufficiently expressed by a number of shares and debentures of an existing corporation, which, in effect, constituted the consideration for the particular transfer in this case. Now, that there was a conveyance is beyond all question. The persons who are named as vendors in the deed have divested themselves of their property in the subject of that conveyance, and all that property is vested in an entirely

independent and separate body, — namely, a corporation. Suppose that corporation had consisted of altogether different persons, no one for a moment would doubt that this was a conveyance on sale. Suppose there had been one person in it different, there is nothing that I have heard in the argument which induces me to suppose that even in that case it could have been doubted that this was a conveyance on sale. But the argument, as I understand it, is this, — that the individual corporators who composed that corporation were, in fact, the very identical persons who were conveying this property to the corporation, and the corporation had no other property except this which it took under its conveyance; and that, as the only value of the shares and debentures was derived from this very property which the individual corporators were conveying to the corporation, the conveying partners either got no consideration for that which they conveyed other than part of the property actually conveyed, or they got no consideration at all. Now, I do not follow that argument in the least. I think it is a fallacy from beginning to end.<sup>1</sup> In the first place, a corporation is a different thing from the individuals who compose it; and, secondly, the shares and debentures of a corporation are not the same thing as the property which that corporation owns. You may say, in one sense, that the property is a security for the value of those shares. The value of those shares in the market, which observe are immediately transferable, may depend upon the solvency of the company, the amount of property it possesses, and its chance of carrying on a profitable business. To say that the shares and debentures are part of that property seems to me to be a complete confusion of terms. Suppose the case, which I put during the argument, of a sale of real estate, and the whole of the purchase-money not to be paid at once in cash, but to be secured on mortgage on that real estate; and, if you like, in order to make the analogy perfect, suppose the purchaser had no other property than that property, would the transaction be the less a sale for that reason? Still the consideration given would be a certain amount of cash which would be left on the security of the estate; but I have never yet heard that because the whole of the purchase-money upon a sale of real estate was left on mortgage of the real estate, that for that reason the transaction ceased to be, or was prevented from being, a sale. Yet, really, that is what the argument in this case comes to. I confess I am not able to agree with it. Nothing else was suggested which should prevent this transaction from being a sale, and it seems to me clearly to be, under the words of this statute, “a conveyance on sale” for a consideration, which, if not money, at least is money’s worth. I, therefore, with all deference to CAVE, J., think that his decision must be reversed, and the appeal allowed.

A. L. SMITH, L. J. The question in this case is whether the instrument of November 27, 1891, is a conveyance or transfer on sale of any of the property mentioned under the second head — “conveyance or transfer” — in the schedule to the Stamp Act of 1870.

Now, in order to find out what is, or is not, a conveyance or transfer on sale of any property in that second head of the schedule, I must refer to ss. 70 and 71 of the Act. And, reading both these sections together, it seems to me that the term "conveyance on sale" includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser in consideration of any stock or marketable security. That is the definition.

First of all, then, is this an instrument whereby any property is transferred to or vested in the purchaser? I beg to say, Yes. It is an instrument upon the face of which the actual land of the vendors, and the trade-marks which are their property, are transferred to a limited company. I do not think that this is disputed, and it does not appear to me to be disputed so far, in the judgment of my brother CAVE; but what he says is that this is not an instrument whereby any property, upon the sale thereof, is transferred. The real pith of his judgment is that the vendors and vendees are the same persons — that the agreement as regards the sale was carried out by the members of the old firm before any company limited came into existence, and that inasmuch as they are the same persons now as then, there is no sale at all; and, therefore, there is no instrument whereby any property upon the sale thereof is transferred. I must here respectfully differ with my brother CAVE. It seems to me that the company limited are not the same persons as the eight members of the old firm — they are different altogether. It was admitted by Mr. Finlay in argument, though he entirely took away the ground from under my brother CAVE's feet when he said so, that the company limited could maintain a suit for specific performance against the old partners. If that is so, how can they be the same persons? This really shews that they are not the same persons. It is here that I disagree with my brother CAVE.

The respondents also contend that there was no consideration. We must read the two sections together. Sect. 70 enacts that: "The term 'conveyance on sale' includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser." Then s. 71 implies that it may be in consideration of any stock or marketable security. The land and the trade-marks are transferred by this instrument from the eight partners who were the old firm to the new company limited. The land and trade-marks are transferred by this instrument in consideration of what? In consideration of stock or marketable securities, which, undoubtedly, are not the same things as the land and trade-marks themselves, though they may be charges upon the land and trade-marks which are conveyed. It seems to me that it is untrue to say that in this transaction there has been no consideration passing from the vendee to the vendor. Although charges upon the land and the trade-marks, the consideration comes within the very terms of s. 71 itself, — "any stock or marketable security."

For these reasons, I prefer the judgment of my brother WRIGHT to that of my brother CAVE.

*Appeal allowed.*

## GALLAGHER v. GERMANIA BREWING CO.

1893. 53 *Minnesota*, 214.<sup>1</sup>*Freeman P. Lane, and Wm. H. Briggs, for appellant.**Gretchen & McHugh, for respondents.*

MITCHELL, J. The plaintiff, as assignee of one Westphal, under a general assignment for the benefit of creditors, brought this action to recover for goods sold and delivered by his assignor to the defendant corporation. Barge & Vander Horck intervened, and set up in their complaint that they owned, and for nearly two years had owned (each one half), all the capital stock of the defendant, no other person but themselves having any interest in the stock or property of the corporation; that each of them had a valid and unsatisfied judgment against Westphal upon a cause of action which accrued before the assignment to plaintiff; that Westphal was, and for over two years had been, utterly insolvent; and that his estate, of which plaintiff is the assignee, was so hopelessly insolvent that it was insufficient to pay even the expenses of administering the assignment. The relief sought was that their claims against Westphal might be allowed, in equal amounts, as equitable set-offs to the claim of the plaintiff against the defendant corporation. From an order overruling a demurrer to the complaint, the plaintiff appeals, his contention being, First, that Barge & Vander Horck had no such interest in the litigation as to entitle them to intervene; second, that their claims cannot be set off against a claim against the corporation, because a corporation is a legal entity, entirely distinct from its stockholders. These two propositions amount really to the same thing, for, if Barge & Vander Horck cannot set off their claims against that of plaintiff against the corporation, they have no such interest in the subject of litigation as would entitle them to intervene; on the other hand, if their claims are proper, equitable set-offs, their right to intervene for the purpose of setting them up is very clear. The case is certainly a novel one, for we doubt whether an instance can be found in the books where stockholders ever attempted to set up their several equities by way of set-off to claims against the corporation. Of course, the want of a precedent is by no means controlling with courts, especially in administering equitable relief; but it would seem that, if the relief here asked was consistent with legal or equitable principles, some case would be found where it had been granted. The facts of the present case appeal to a natural sense of justice, for while, by fiction of law, a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property. Hence, if interveners cannot set off their claims, the practical result is that Westphal's estate will collect its entire claim out of what is really their property, while the estate is at

<sup>1</sup> Statement and arguments omitted. — Ed.

the same time indebted to them on claims of greater amount, which they will wholly lose because of Westphal's insolvency; but, as has been often said, hard cases are liable to make bad law.

The right of equitable set-off is, of course, not derived from, or dependent upon, statute, but rests upon a distinctly equitable doctrine, which courts of equity have applied on certain well-recognized equitable grounds, the object being to effect a clear equity and prevent irremediable injustice; and it may be stated as a general rule that, whenever necessary to accomplish that end, the courts will permit an equitable set-off, although the debts accrued in different rights; as, for example, by allowing a separate debt to be set off against a joint debt, or, conversely, a joint debt against a separate debt. They will also disregard the nominal parties to the record, and consider the real parties in interest; as, for example, when the assignor of a chose in action sues for the benefit of the assignee, or a trustee for the benefit of the cestui que trust. Hence, had the plaintiff's claim been a joint one against the interveners, there would have been no doubt of their right to set off their separate claims against it, for insolvency is well recognized as a distinct equitable ground for allowing such a set-off. But such a case is not analogous to the present. To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders, and to treat it as a mere association of individuals who are the real parties in interest. In dealing with the rights of creditors, and the obligations existing between a corporation and its shareholders by reason of their contract of membership, undoubtedly the courts often find it necessary to consider the real parties in interest as the individual shareholders; but it may be laid down as a rule that, except in such cases, it has been found absolutely essential, for the administration of justice, to treat a corporation as a collective entity, without regard to its individual shareholders. In no other way can the title to corporate property be kept free from complication and uncertainty. The transferable nature of stock in a corporation is also a good reason why the theory of a corporate entity should be preserved, and why it is necessary to discriminate sharply between corporate rights and obligations and those of shareholders personally. If the rights or liabilities of a corporation could be affected by the acts of the stockholders, except when acting in the corporate name, or if shareholders could set up their several equities against persons having claims against the corporation, or, conversely, if claims in favor of the corporation could be set off against claims against individual stockholders, it can easily be seen into what confusion and chaos corporate affairs would inevitably fall. Inasmuch as the two interveners own all the stock of this corporation, the facts of this case seem comparatively free from embarrassments, and the contention of respondent quite plausible. But, suppose there were fifty other stockholders (which would not alter the principle), what

except?

Reasons.

a) Title

b) Preserv<sup>n</sup>  
1. 4. 7

would be the result? Could interveners then interpose their claims as set-offs, and, if so, could they do so to the full amount of their claims, or only in the proportion which their shares bore to the whole capital stock? And, if the former, would they have a claim for the excess against the corporation, or a right to call on the other stockholders for contribution?

Again, the right of set-off, if any exists, must be mutual. Hence, if stockholders can interpose their individual demands as set-offs to a demand against the corporation, it follows that a defendant can set up demands against the individual stockholders as set-offs to demands in favor of the corporation. Illustrations might be multiplied indefinitely to show that to recognize any such right would result in the worst sort of complications, and that the only safe or sound rule is to adhere strictly, in such cases, to the doctrine of a corporate entity distinct from the individual stockholders. What means, if any, the interveners might have had, or may hereafter have, of protecting themselves, it is not now our business to inquire, but we are clear that their claims against plaintiff's assignor are not the subjects of equitable set-off to a claim against the defendant corporation.

*Order reversed.*

*where the stockholder's claim is for the benefit of the corporation, the claim is not a claim against the corporation.*

# MOORE & HANDLEY HARDWARE CO. v. TOWERS HARDWARE CO.

1888. 87 *Alabama*, 206.<sup>1</sup>

**APPEAL** from the Chancery Court of Jefferson.

Bill filed Dec. 3, 1888, by Towers Hardware Co., a private corporation, against Moore & Handley Hardware Co., another private corporation, seeking to enjoin defendant company from selling "plow-stocks and plow-blades" in violation of a contract made between plaintiff company and a partnership doing business under the name of Moore, Moore & Handley, which was composed of James D. Moore, Benj. F. Moore, and William A. Handley, who, as the bill alleged, afterwards formed the defendant corporation. The allegations of the bill were, in substance, as follows: Said partnership, May 27, 1887, sold out to plaintiff their entire stock of plow-stocks and plow-blades; signing an agreement — "we agree not to handle any more plow-stocks or plow-blades, except railroad plows." On March 12, 1888, the defendant company was incorporated under the general statutes. The said partners each subscribed one-fourth of the capital stock, and one Wimberly one-fourth. If Wimberly ever had any interest in the corporation, he had not had it since Aug. 8, 1888. Said Moores and Handley are

<sup>1</sup> Statement abridged. Arguments, and part of opinion, omitted. — Ed.

Keep Corp for C made by its org<sup>n</sup> prior to incorp<sup>n</sup>: If those who afterwards org<sup>n</sup> corp def'n at time, & C unless prospect<sup>s</sup> org<sup>n</sup> to be bound, don't speak make C only a prop<sup>r</sup> corp then unless format were a mere fr<sup>s</sup> to enable promoters & members to evade their obligations the Co is not by C.

MOORE AND HANDLEY HARDWARE CO. & TOWERS HARDWARE CO. 39

cf 40 LRA 632

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now the sole owners. The defendant corporation was organized for the purpose of carrying on the same business which the partnership had carried on. Its capital stock was paid for wholly in the assets of said partnership. It succeeded to all the property rights and assets of said partnership, as well as all the liabilities thereof. Said defendant corporation is none other than said J. D. Moore, B. F. Moore, and Wm. A. Handley, who constituted said partnership, and now constitute said corporation. "Your orator cannot say whether or not said Moores and Handley organized said corporation for the purpose of evading the force and effect of their said agreement with your orator, but does say and charge that the effect of their doing so would be to perpetrate a fraud on your orator, if they should be allowed to handle plow-blades and plow-stocks; that the defendant's business, as now conducted, is identically the same as that conducted by said Moores and Handley, is conducted by the same persons, and in substantially the same manner as before, and that the only change in fact has been in the name of the concern.

The defendant corporation answered the bill; denying that it assumed, or became liable for, the obligations of said partnership, or of its individual partners, or that it acquired any interest in the outstanding notes and accounts due to said partnership, or the real estate owned by the partners, which was more than sufficient to pay all their outstanding debts and liabilities; alleging that Wimberly owned a one-fourth interest in the corporation at its organization, and for some time acted as its treasurer, but admitting that the Moores and Handley had since bought out his interest; and demurring to the bill for want of equity.

After answer filed, defendant moved to dissolve the temporary injunction and to dismiss the bill; and this appeal is taken from the decree of the Chancellor refusing these motions.

*Smith & Lowe*, for appellant.

*Cabaniss & Weakley*, contra.

MCCLELLAN, J. The equity of the bill, so far as the injunction is concerned, and the sufficiency of those of its allegations which are not denied by the answer to sustain the injunction depend, primarily, on two questions. *First*, whether the contract relied on is void, as being in unreasonable restraint of trade; and, *second*, whether a negative undertaking entered into by persons who subsequently organize, and for the time constitute a corporation for the prosecution of the business with respect to which the contract was made, can be enforced by injunction against the corporation.

1. [The learned Judge held that the contract was not void, as being in unreasonable restraint of trade.]

2. The general doctrine is well established, and obtains both at law and in equity, that a corporation is a distinct entity, to be considered separate and apart from the individuals who compose it, and is not to be affected by the personal rights and obligations and transactions of its



stockholders, and this whether said rights accrued or obligations were incurred before or subsequent to incorporation. 1 Mor. Priv. Corp. §§ 227-234, 547-549; *Morrison v. Mining Co.*, 52 Cal. 309; *Hawkins v. Mining Co.*, *Id.* 515; *Gent v. Insurance Co.*, 107 Ill. 658; *Railroad Co. v. Helensburgh*, 2 Macq. 391; *Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. Rep. 22. There is a class of contracts, however, which are entered into between the promoters or projectors of a contemplated corporation and third persons on the faith of the corporation, intended to inure to its benefit, and which in point of fact do inure to its benefit, on which the corporation will be charged, even in the absence of an express promise to perform, or ratification on the part of the company after it is *in esse*, on "the familiar principle that one who adopts the benefit of a contract which another volunteers to perform in his name and on his behalf is bound to take the burden with the benefit." 1 Redf. R. R. (5th ed.) 18; *Edwards v. Railroad Co.*, 1 Mylne & C. 650; *Stanley v. Railway Co.*, 9 Sim. 264; *Little Rock & F. S. R. Co. v. Perry*, 37 Ark. 164; *Perry v. Little Rock & F. S. R. Co.*, 44 Ark. 383; *Bommer v. Manufacturing Co.*, 81 N. Y. 468. And in those cases where associates combine together to create a paper corporation to cover a partnership or joint venture, and where the stockholders are partners in intention, and have resorted to the fiction of separate corporate entity to free themselves from individual obligations which had attached to them, with respect to the business they propose to carry on, prior to the organization of the company, courts of equity, when the ends of justice require it, will disregard and look beyond the fiction of corporate entity, and hold the corporation to a discharge of the liabilities resting on its members; and this may be done although some of the shareholders had not originally incurred the obligation sought to be enforced, provided they had notice of it before entering the corporation and participated in the effort to avoid it. *Wheel Co. v. Wagon Co.*, 20 Fed. Rep. 700; *Beal v. Chase*, 31 Mich. 490, 495, 532.

The contract of Moore, Moore & Handley, sought to be enforced against the Moore & Handley Hardware Company, was not an undertaking between promoters of the company and third parties, nor made on the faith of the corporation, nor intended to inure to its benefit, nor did it inure, in point of fact, to the benefit of the corporation. It is not of that class of contracts which courts enforce against corporations on the grounds that they were made in the corporate name by anticipation, and that the corporation received and accepted the benefits resulting from them. There is no allegation of fraud made against the corporation or its shareholders, and the implication of the fraudulent effect of the corporate action complained of is denied. It is not shown that this is a mere "paper corporation" to cover a joint venture in which the corporators are partners in intention, and have resorted to this form for the purpose of evading and avoiding obligations which they had taken upon themselves as individuals, or for the purpose of evading the

1. One B. got a mine and started forming a corp. Before it was formed railroad m. corp. agreed that M. (H) was to have 2500 shares of m. corp. with pay. After corp. was formed B. as Pres. Co. drew an order on it also as Pres. of himself to pay the shares to M. on pay. & gave the order to M. 2. M. went to corp. & demanded shares. B. as Pres. & Co. & all refused to pay order. This order to B. & trustees. M. sued Corp. for cv. Held B. order as Pres. drew on mine & was to a cv. & stock for Corp.

promise relied on here. If these things had appeared in the case we should not hesitate to hold the corporation answerable for the individual obligation. But in the absence of fraud "no authorities have gone the length of holding that any contract made with individuals exclusively upon individual credit will become the contract of any future corporation that may form for the more convenient management and use of the benefits of it." *Little Rock & F. S. R. Co. Cases, supra*. If the case of *Beal v. Chase, supra*, goes beyond this doctrine, we cannot indorse it. We do not think it does. In that case the corporation had been formed for the purpose of violating a contract not to engage in a certain business. All the corporators were held to have participated in this purpose. The business was to be conducted by the corporation in connection with the promisor in his individual capacity. He had an interest in it, both individually and as the principal shareholder of the company; and the court enjoined the corporation, not generally, but from carrying on the business with or for the individual contracting party. To put the case at bar in line with that case it would have to appear, not only that the corporation organized for the purpose and with the intention of evading their contract through the separate entity of corporate existence, but also that they reserved an interest in the business distinct from their interests as stockholders. None of these facts are shown. The effect of allowing the injunction in this case to continue would necessarily be to hold all future shareholders in the corporation to the performance of a contract which neither they nor the corporation had ever entered into, and of which they may not even have had notice. Such a result could only be justified on the ground of bad faith in the creation of the company. To thus hamper a *bona fide* corporation would be inequitable, and have the effect of establishing a doctrine fraught with much danger to corporate rights, powers, and property.

The allegations going to show a ratification by the corporation of this contract of Moore, Moore & Handley are denied by the answer, and hence cannot be considered in passing on the decree overruling the motion to dissolve the injunction. Those allegations of the bill which are not denied were not sufficient to authorize a continuance of the injunction, and the decree on that point was erroneous, and is reversed. The contract relied on here is such a one as the respondent corporation could have made under its charter. It is therefore one which, being already in existence between complainant and the individuals composing the defendant company, the corporation had the power to ratify and adopt. The bill, in our judgment, sufficiently avers such ratification or adoption. These allegations give equity to the bill, and the decree overruling the demurrer is affirmed. The cause will be remanded, with instructions to the chancellor to dissolve the injunction, unless the complainant amends its bill so as to entitle it to a continuance of the writ, under the principles we have announced.

*Reversed and remanded.*

## HALL'S SAFE CO. v. HERRING-HALL-MARVIN SAFE CO.

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1906. 146 Fed. 37.

SEVERENS, Circuit Judge. The parties to this controversy are engaged in the business of manufacturing and selling safes. The complainant is a corporation organized under the laws of New Jersey. The defendant the Hall's Safe Company is an Ohio corporation, and the other defendants are citizens of that state. The bill was filed for the purpose of obtaining an injunction restraining the defendants from carrying on the business of manufacturing or selling fireproof or burglar proof safes or vaults under the name of the "Hall's Safe Company," or under any other trade-name substantially or essentially the same, and calculated to deceive the public or intending purchasers into the belief that they are dealing with the complainant, or with the establishment founded by Joseph L. Hall and carried on by complainant, when they are dealing with the defendants, and from advertising their products as "Hall's Safes," and from marking them with that name, and for the recovery of profits and damages already lost and suffered by the complainant from acts of the like character, and there was a prayer for general relief.

The facts, about which there is not much controversy, are these: From about the year 1847 to 1867, one Joseph L. Hall had, in successive co-partnerships with other persons, been engaged at Cincinnati, Ohio, in the manufacture and sale of fire and burglar proof safes. In this business he had been the principal and managing member of his firms. In the latter year (1867) he with other persons organized a corporation under the laws of Ohio by the name of "Hall's Safe & Lock Company," for the purpose of carrying on the same business. Its factory and principal office were located at Cincinnati, and its business of selling safes extended throughout the United States and into foreign countries. Its safes were known as "Hall's Safes" and "Hall's Standard Safes," and certain styles of them were marked "Hall's Standard Safes," and the safes had a good reputation. In March, 1889, the said Joseph L. Hall, who was at that time the principal stockholder in the corporation last mentioned, died. His sons, Edward C., William H., and Charles O. Hall, were also stockholders. The first two became, successively, presidents of the corporation. The stock of Joseph L. Hall continued part of his estate, and the business went on as before until May 4, 1892, when the corporation sold to the Herring-Hall-Marvin Company, a New Jersey corporation, all its "real estate and leasehold interests, tools, machinery, fixtures, merchandise, trade-marks, and good will," and the Hall's Safe & Lock Company covenanted and agreed that it would close up its affairs and be dissolved and would not in the future engage or continue in said business. This sale and agreement was assented to by the above-

of a corp  
of Ohio Corp  
Ohio whole

Hall's Safe & Lock Co  
an Ohio Corp sold  
out to Pf + co's  
not to reengage  
in bus. The Hall  
bro's assented to  
sale.

as to Transfer to a Corp. a Promoters Right to carry on Bus. i. his own name: Altho an individ  
is entitled b.f. to carry on bus. i. his own name, even tho it resemble that of some estab<sup>d</sup>  
concern, yet this is a pers<sup>l</sup> right wh he cant confer on a 3<sup>d</sup> p<sup>ty</sup> not even on a corp org<sup>d</sup>  
by him since it is a distinct legal entity cf 145/380. cf 208 US 267.  
cf also (1917) 2 Ch 184, 189, 190; 144 N.Y. 462, 370 E 1017; 113 S 2 6. 198 US 118.

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named sons of Joseph L. Hall, who are the individuals made defend-  
ants in this cause. Edward C. Hall and William H. Hall at or about  
the date of the transfer became stockholders (as we must suppose),  
directors, and, respectively, president and treasurer, of the Herring-  
Hall-Marvin Company, at stated salaries agreed upon at the time of  
said transfer. But in 1895 these persons were deposed from their  
offices, and their salaries reduced, and on August 1, 1896, they re-  
signed their offices as directors. Their resignations were accepted, and  
they withdrew from the company. At the time when these parties  
became associated with the Herring-Hall-Marvin Company, a written  
agreement with that company was entered into by each of them, which,  
after stating the terms of their employment, contained the following  
stipulation:—

"And in consideration as aforesaid, I, the said Edward C. Hall (in  
the other contract, William H. Hall), do hereby covenant, promise,  
and agree that I will not, so long as the Herring-Hall-Marvin Com-  
pany may desire to retain my services as above, engage, either in the  
State of Ohio, or in the State of New Jersey, or in any of the states  
east of the Mississippi River, in the business of manufacturing, sell-  
ing, buying, or dealing in fire or burglar proof vaults and safes, or in  
any business or occupation such as the said corporation known as the  
Hall's Safe & Lock Company has heretofore been engaged in, or such  
as the Herring-Hall-Marvin Company is authorized or empowered to  
engage in, or in any other business which will or may compete or in-  
terfere in any manner with the business of the said Herring-Hall-Mar-  
vin Company."

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In September, 1896, Edward C. Hall, William H. Hall, Charles O.  
Hall, and other persons organized a corporation under the laws of  
Ohio by the name of the "Hall's Safe Company," the corporate de-  
fendant herein, and this company shortly thereafter went into the  
business of manufacturing and selling safes. A bill in equity was  
soon after filed in the Circuit Court of the United States against the  
new company by the Herring-Hall-Marvin Company, complaining that  
the former was infringing its trade and good will, and praying for an  
injunction. While that suit was pending the Herring-Hall-Marvin  
Company became insolvent, and a receiver was appointed. A new  
corporation was organized in New Jersey, the complainant in this  
suit, an order of the court for a sale of the assets of the old com-  
pany was obtained, and the new company became the purchaser in  
December, 1900, by a deed which purported to convey to the com-  
plainant all the real estate, personal property, manufacturing plant,  
tools, machinery, merchandise, assets, franchises, property, and  
good will of the Herring-Hall-Marvin Company. The bill in that  
case was dismissed upon a ground not now material, but without  
prejudice. Not long after the present bill was filed by the new  
company.

The gravamen of the complaint is that the defendants invade and

injure the good will and reputation of the complainant's business by the adoption of the corporate name of the defendant, the "Hall's Safe Company," and also by inducing the public, through advertisements, circulars, and other representations, to believe that their safes are the product of the complainant's business. The defendants admit the acquisition by complainant of the properties, including the good will of the Hall's Safe & Lock Company, but claim that the individual defendants were not by the sale of the latter company deprived of the right to organize a new company which shall include their family name, and that the name of "Hall's Safe Company" is one which may lawfully be adopted. The defendants also filed a cross-bill, in which they charge complainant with unfair conduct in seeking to divert the defendant's trade by false representations concerning it. The complaint of the cross-bill was that the defendant therein had some time prior to the commencement of this suit removed its manufacturing plant from Cincinnati to Hamilton, Ohio, and had directed all mail addressed to the Hall's Safe & Lock Company at Cincinnati to be forwarded to it at Hamilton, and that it was holding itself out as the Hall Safe & Lock Company or Hall Safe & Lock Works, and the like, and was representing by its signs, advertisements, publications, and stationery that it was the "Successor of Hall's Safe & Lock Co.," or was "operating Hall's Safe & Lock Works," or was making and selling "Hall's Safes," and upon answer and replication evidence was taken upon those matters. The court below dismissed the cross-bill, and decreed for the complainant upon the original bill, awarding an injunction. Complaint is made of the decree, that it is vague and uncertain in respect to the things which the defendants are restrained from doing; a matter to be recurred to later on.

Counsel for complainant contend that it is entitled to the relief it demands by virtue of the contract between its predecessor and assignor and the Hall Safe & Lock Company by which it, through the assignment, acquired the property and good will of the latter company, and that its rights are not to be measured by the rules and principles which apply in the case of unfair competition in trade; and it is argued that this consideration distinguishes the case from that of *Howe Scale Co. v. Wyckoff, Seamans, etc.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, where there was much discussion of the extent of the right of a person to use his own name in the conduct of his business, whether it be his private business, or that of a corporate business in which he is associated with others; and reference is made to the language of the chief justice at page 140, where he says:—

"We hold that, in the absence of contract, fraud, or estoppel, any man may use his own name in all legitimate ways, and as the whole or a part of a corporate name."

Upon this contention it becomes important to determine what were and are the relations between the complainant and its predecessor in

title and the several defendants. Undoubtedly the Herring-Hall-Marvin Company acquired by its contract of purchase with the Hall Safe & Lock Company all its physical properties and the good will which it had acquired in its business, as well as the right to use such trade-names as had been customarily used to identify its products. It acquired also the right to require that the Hall's Safe & Lock Company should go out of business, or, in substance, that it should not longer engage in business of the kind which it sold to the Herring-Hall-Marvin Company. But it is contended that the contract reaches beyond the corporation, the Hall Safe & Lock Company, and binds the defendants who were stockholders and officers of the corporation, and prevents them and any corporation of which they may become stockholders and managers from doing what the Hall Safe & Lock Company could not do; and the principal reason for this contention is the fact that these individual defendants participated in the sale, and as stockholders received its benefits. We are of opinion that this proposition cannot be sustained. The contract which the Herring-Hall-Marvin Company had was with the corporation only, and not with its stockholders or officers. The officers who conducted the business of the selling company were not parties to the contract. It is a familiar rule that an agent, who, having lawful authority, makes a contract with another for a known principal, does not bind himself, but his principal only (Story on Agency, § 261; Mechem on Agency, § 555; *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050); and the officers of a private corporation, in respect to their liability on contracts entered into by them in behalf of the corporation, stand upon the same footing as agents of private individuals (21 Am. & Eng. Ency. of Law [2d Ed.] 879; *Whitney v. Wyman*, supra). If the purchaser desired to make the officers and agents of the selling corporation subject to the stipulations of the company in the contract of sale, it should have required their personal agreement to that effect.

The cases cited by counsel for the complainant to support their contention that the court may look through the form of a corporate organization, and fasten upon the stockholders a liability for the acts of the corporation, do not support such a doctrine as applicable to contract relations. These are *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541, *McKinley v. Wheeler*, 130 U. S. 630, 9 Sup. Ct. 638, 32 L. Ed. 1048, and *Anthony v. American Glucose Co.*, 146 N. Y. 407, 41 N. E. 23. They were all cases where, for special purposes and in special circumstances, the court held that it was competent and proper to regard the rights and duties of stockholders in corporations. None of them impugns the general rule above stated that in matters of contract the officers and agents of a corporation are not bound personally by stipulations made by them in behalf of their principal. This rule is not affected by the circumstance that they are indirectly interested as stockholders

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in the contracts of their corporation. If it were so, it would break down all distinction between the corporate entity and its component parts. Counsel for the appellee have printed in their brief a recent decision, not yet published, of the Circuit Court of Appeals for the Seventh Circuit, in a case entitled *Hall's Safe & Lock Company and James W. Donnell v. Herring-Hall-Marvin Safe Co.* The suit was brought to restrain the defendant from using in its business the corporate name of the complainant as descriptive of its products. The defendant filed a cross-bill to restrain the complainant in the original bill from using the name of the Hall's Safe & Lock Company in their business of making and selling safes, and from selling such safes as "Hall's Safes." It appears from the opinion that Donnell had organized an Illinois corporation, the co-defendant, with the name of the old Hall's Safe & Lock Company, having no member of the name of Hall, and was carrying on the safe business under that style at Chicago. The court holds — what we should suppose quite clear — that this assumption of the name of "Hall's Safe and Lock Company" was a fraudulent device to appropriate the good will of the old company, to which the Herring-Hall-Marvin Safe Company had succeeded. It is also held that the defendant in the cross-bill should be restrained from selling safes which were not of the manufacture of the Herring-Hall-Marvin Company, as "Hall's Safes." It was claimed that the defendant in the cross-bill was selling under that name safes made by the Hall's Safe Company, the defendant here. It was only in this incidental way that the rights of the Halls were considered, and of course they could not be adjudged in that suit.

We do not think there is any substantial difference between the conclusion of that court upon the propriety of the use of the designation "Hall's Safes" and our own. We think it quite likely that court would have accepted the qualification that the use of such a designation in the business of the Halls would not be unlawful provided it was accompanied by explanatory matter showing that the product was their own, and not that of the old company or its successors in business. It is true that the learned judge who delivered the opinion said *arguendo* that the court might look behind the corporation, and find whether there were equities between the Herring-Hall-Marvin Company and the members of the Hall's Safe & Lock Company which would attach to the Hall's Safe Company, of which they are now members, and, concluding there were such equities, proceeded to deduce the consequences. Without repeating what we have said upon this subject, we are constrained to think that the defendants Hall were not bound individually, in law or in equity, by the contract of their corporation.

The determination of the case must depend upon the application of other principles than such as would obtain if there were contractual relations between the parties in reference to the subject-matter of the suit. When the Herring-Hall-Marvin Company purchased the Hall

Safe & Lock Company's plant and business, it acquired the good will of the latter company, and this included the right to use the means of communicating to the public information that it had succeeded to the business and good will of its vendor, and among these rights was that of using the trade-names which had been employed in the business, and by which the products thereof had been identified and known; and although the receiver's conveyance to the complainant did not in terms convey the right to use the old-trade names, yet, as it professed to convey all the assets of the Herring-Hall-Marvin Company, including the good will, we think it should be held that the purchaser acquired the right to designate its products by the same means as its predecessor in title had done. These rights it was entitled to enjoy exclusively. They were its property. Neither these defendants nor any other person could lawfully invade them, and we put the statement in this form to signify that in our opinion the defendants were precluded equally with, and not otherwise than, all other persons; because it seems to us that, if there are no contractual relations between the parties, it is indifferent that the rights of the complainant are derived from the Hall Safe & Lock Company.

It would not be difficult to define in comparatively set terms the limits within which the parties to this controversy should be confined, were it not for the fact that these individual defendants bear the name which has long been associated with the complainant's products. Joseph L. Hall left five sons, of whom the defendants Hall were the eldest, and they were all bred to the father's business, and have followed it from their youth. They undoubtedly have the right to pursue the occupation of manufacturing and selling safes, and they have the right to use their own family name in the business, and adopt all proper means of making it known to the public that the safes they offer are made by them, and they have the right to build up a business with a good will of its own, and if they choose to organize a corporation for that purpose, they have the right to use their family name in its title. But in doing all these things neither these individual parties nor the corporation has the right to endeavor to lead the public into the belief that the safes they make are the product of the Hall Safe & Lock Company's successors in business. If, notwithstanding the defendants conduct their business within these limits, it should happen that from the similarity of names and the kind of business, intending purchasers might sometimes fall into the mistake that the defendants were the successors of the Hall Safe & Lock Company, and were making the kind and quality of safes that were made by that company, the defendants would not be responsible therefor. If in the choice of a corporate name one should be chosen which would be likely to catch the complainant's business, it would be necessary to accompany its use in the business of the company by explanatory statements, which



would prevent any misunderstanding; for such a choice without explanation would be prima facie evidence of unfair dealing. The cases upon this subject have come to be very numerous, and it is unnecessary to canvass them. This has been done so recently in several decisions of the Supreme Court that we shall content ourselves with the statement of the controlling principles which we conceive to be now established, referring for authority to *Howe Scale Co. v. Wyckoff, Seamans, etc.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; *Turton & Sons v. Turton & Sons*, L. R. 42 Ch. Div. 128; *Reddaway v. Benham*, L. R. App. Cas. (1896) 199. The subject was also elaborately discussed and the authorities cited in the opinion of this court in *Royal Baking Powder Co. v. Royal*, 122 Fed. 337, 58 C. C. A. 499, delivered by Judge Lurton.

Recurring to the facts of the present case, the name adopted for the corporation was "Hall's Safe Company," a name so dangerously near to that of the "Hall's Safe & Lock Company" as to make it apparently necessary, to avoid mistake, that explanation should be made that it was not the same company or its successor in business. The testimony shows clearly enough that this had not been done, and although for a short time before the filing of the petition the defendant's practices had been mended in this regard, there was sufficient ground to apprehend the repetition of unauthorized pretensions by defendants to justify the complainant in invoking the power of the court to prevent them. Inasmuch as the individuals who are made defendants are not engaged in a business or proposing to engage in a business of their own prejudicial to the complainant, it would seem that the relief required should be the restraining of the corporation and its officers and agents from committing the unlawful acts complained of. It is not alleged in the bill that these defendants are personally committing, or threatening to commit, any injurious acts. They are apparently made parties because of the fact that they were large stockholders in the Hall's Safe & Lock Company, and had assented to the sale of its properties, and had been instrumental in the organization of the new company. But we do not think the latter fact alone subjected them to any liability, and if, as we have held, they were not personally bound by the stipulations of the company, we perceive no sufficient ground for awarding an injunction against them. This has often been held in suits brought for the infringement of patents, and the rule seems equally applicable to cases of the character before us. *Western Union Tel. Co. v. Home Tel. Co.*, (C. C.) 85 Fed. 649; *Bowers v. Atlantic, G. & P. Co.*, (C. C.) 104 Fed. 887; *Loomis-Manning Filter Co. v. Manhattan Filter Co.*, (C. C.) 117 Fed. 325; *Greene v. Buckley*, (C. C.) 120 Fed. 955.

But we think the facts justified an injunction against the Hall Safe Company, though not in the terms stated in the decree.

[The court here set forth the terms of the injunction to be allowed.]

The costs of this appeal will be borne by the appellant Hall's Safe Company and the appellee, to be equally divided.

*See. 208 WD 267.72. (1907)*

<sup>1</sup>BRODERIP v. SALOMON. *cf* 26 LQR 11-16.

1895. *Law Reports* (1895), 2 *Chancery*, 323.

### SALOMON v. SALOMON & CO., LIMITED.

1896. *Law Reports* (1897), *Appeal Cases*, 22.<sup>1</sup>

In 1892, Aron Salomon was carrying on business as a leather merchant, &c., and was solvent. July 28, 1892, a Limited Company was registered, under the Companies Act of 1862, for the ostensible purpose of taking over and carrying on the business then conducted by Salomon.

The Act of 1862 provides (Section 6), that "any seven or more persons, associated for a lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the provisions of the Act in respect of registration, form a company with or without limited liability." "No subscriber shall take less than one share" (Section 8). The Act prescribes no minimum value for shares, and hence the shares may be of as small a value as those who form the company may please. Nor does the Act impose any limit upon the number of shares which a single member may subscribe for. Section 30 provides that no notice of any trust shall be entered on the register. Upon the registration of the memorandum of association, and of the articles (where required), the registrar shall certify that the company is incorporated. "The subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands." . . . (Section 18.)

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The name of the company was Aron Salomon & Co., Limited. The nominal capital was 40,000*l.*, divided into 40,000 shares, of 1*l.* each. The memorandum of association was subscribed by Salomon, his wife, his daughter, and his four sons, each subscribing for one

<sup>1</sup> Statement rewritten. Arguments omitted; also portions of opinions. — Ed.

This kind of Co [the One Man Co.] incurred odium from its adventurous and not necessarily incident to its constitution. One was that it was too often a device adopted by an insolvent trader to save a failing business and achieve this existing Co. unless the trustee in his bankruptcy set aside the sale. The other m.

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share. Salomon then conveyed his business and its assets to the company for an agreed price of about 39,000*l*. In consideration of this conveyance, he received from the company some payments in cash, also debentures (a charge on the assets) for 10,000*l*., and shares for the par value of 20,000*l*.<sup>1</sup> No other shares were ever allotted; and it was never intended that any shares should be allotted to any person except Salomon and the six members of his family. The practical result was, that Salomon owned  $\frac{2}{3}$  of the allotted shares; and also held the company's debentures for 10,000*l*.<sup>2</sup>

Subsequently, Salomon, upon the security of his aforesaid debentures, obtained from Broderip a loan of 5000*l*., which sum Salomon re-loaned to the company. Thereafter, in Feb. 1893, the original debentures, which had been issued to Salomon for 10,000*l*., were returned to the company and were cancelled. In lieu thereof, with the consent of Salomon as beneficial owner, fresh debentures of the company to the same amount were issued to Broderip in order to secure the payment of his aforesaid loan of 5000*l*.

Default having been made in the payment of his interest, Broderip, in the autumn of 1893, instituted an action, on behalf of himself and all the debenture holders, to enforce his security. Thereafter a winding up order was made and a receiver appointed.

The company put in a defence and counter-claim, making Salomon a party to the counter-claim. At the time of the company's going into liquidation, 11,264*l*. was due to unsecured creditors whose debts had been contracted since the formation of the company. About 7733*l*. of this was due to trade creditors, the rest to Salomon. The liquidator has realized the assets, by arrangement without prejudice to any question on the counter-claim. He has paid Broderip's "mortgage debt on the debentures," and the rest of the proceeds will not be sufficient to satisfy what remains due on the debentures. Salomon claims whatever there may be as owner of the debentures.

The action was tried before VAUGHAN WILLIAMS J. [The following is an abridgment of the opinion of the learned Judge.]

There was no fraud on the shareholders, inasmuch as they were all perfectly cognizant of the conditions under which the company was formed, and as there was no intention to allot further shares at a later period to outsiders. But the company was a mere nominee of Salomon's; and the case is to be dealt with as if the nominee, instead of

<sup>1</sup> According to a statement in the opinion of Lord Macnaghten, it would seem that, as cash came in to the company from the business, the company went through the form of handing this cash over to Salomon, and then immediately receiving the same cash back from Salomon in exchange for the 20,000 shares allotted to him as fully paid shares. — Ed.

<sup>2</sup> The charge given to the debenture-holder by the company on its property did not operate to prevent the company, while solvent, from using assets to pay current debts; but it gave the debenture-holder a preference over unsecured creditors in the event of insolvency. See 14 Law Quarterly Review, 339; *Davey v. Williamson*, L. R. (1898), 2 Q. B. 194. Buckley on Companies Acts, 7th edition, 186; *Kay, L. J.* in L. R. (1896), 2 Chan. p. 843. — Ed.

was the issue of floating debentures. The trader took from the Co. as part of the proceeds for the sale of his business debentures charging his undertaking & assets. The Co. started carrying on the business & in the course of doing so of course contracted debts. It became embarrassed. The vendor paid the debt & approached, further security in force and resumed poss<sup>n</sup> of the business & the entire leaving the creditors of the Co. nothing for of course the vendors

T. W. said - quoted in A.C. at 16: "I have no doubt whatever that the purchase here was at an exorbitant price". Watson says he thinks so about 2000  
want too strong an epithet. 36

being the company, had been some individual agent of Salomon's to whom he had purported to sell this business. In that case the trustee in bankruptcy of the agent would have had a right to make Salomon indemnify the agent against the debts that he had contracted by the direction of his principal. The right of the liquidator in the present case is precisely the same, notwithstanding the debentures which were a mere form, intended to give an appearance of reality to a sale which, in fact, was no sale at all, because it was a sale by a man to an agent for his own profit. This business was Salomon's business, and no one else's. The creditors of the company could, in my opinion, have sued Salomon. Their right to do so would depend on the circumstances of the case, whether the company was a mere *alias* of the founder or not. The relationship of principal and agent existed between Salomon and the company. The moment the creditors succeed in establishing the identity of Salomon with the company, the creditors of the company thereupon are shown to be the creditors of Salomon; and although it is necessary, in order to get rid of the priority given to Salomon by these debentures, that one should fall back upon the lien of the company as his agent, whom he was bound to indemnify, I do not mean to exclude from my judgment that the debentures were given to Salomon by his agent, the company, and that the necessary effect of Salomon as principal, taking these debentures from his agent, the company, was that his creditors — for, according to my view, the creditors of the company were his creditors — were defeated and delayed by the debentures.

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His Lordship made the following order : —

Declare that the plaintiffs, A. Salomon & Co. Limited, or the liquidator thereof are, or is entitled to be indemnified by the defendant A. Salomon against the sum of 7733*l.* 8*s.* 3*d.* . . .

Order and adjudge that the plaintiffs, A. Salomon & Co. Limited, do recover against defendant A. Salomon the said sum of 7733*l.* 8*s.* 3*d.*

Declare that plaintiffs, A. Salomon & Co. Limited, are entitled to a lien for the said sum of 7733*l.* 8*s.* 3*d.*, upon all sums which would be payable to defendant A. Salomon out of the assets of the plaintiffs A. Salomon & Co. Limited, in respect of the debentures issued by the said company to the defendant E. Broderip in the pleadings mentioned or otherwise, and that the defendant A. Salomon is not entitled to make any claim against the assets of the plaintiffs A. Salomon & Co. Limited, until the said sum of 7733*l.* 8*s.* 3*d.* has been satisfied.

Aron Salomon gave notice of appeal. The company gave a counter-notice of contention that [*inter alia*] they were entitled to have the agreement for the sale of Salomon's business and property to the company rescinded.

Buckley, Q. C. and Muir Mackenzie (McCall, Q. C. with them), for Salomon.

Farwell, Q. C. and Theobald, for the company.

LINDLEY L. J. This is an appeal by Mr. Aron Salomon against an order made by Vaughan Williams J., and which, in effect, directs Mr. A. Salomon to indemnify a limited company formed by him against the unsecured debts and liabilities incurred by or in the name of the company whilst it carried on business.

The appeal raises a question of very great importance, not only to the persons immediately affected by the decision, but also to a large number of persons who form what are called "one-man companies." Such companies were unheard of until a comparatively recent period, but have become very common of late years.

The material facts of this case are as follows: [His Lordship, after stating the facts of the case to the same effect as above, and adding that as to the 20,000 shares allotted to Aron Salomon he (Aron Salomon) contended he had paid for them though no call had ever been made; that the liquidator, on the other hand, claimed 20,000*l.* from A. Salomon in respect of these shares; that A. Salomon had received moneys from the company, but that it did not appear whether he had paid the company for his shares, and that this was a matter which it was unnecessary to pursue further on the present occasion, proceeded as follows:—]

I proceed to examine the legal aspect of this case, which, as I have said, is one of great general importance. There can be no doubt that in this case an attempt has been made to use the machinery of the Companies Act, 1862, for a purpose for which it never was intended. The legislature contemplated the encouragement of trade by enabling a comparatively small number of persons—namely, not less than seven—to carry on business with a limited joint stock or capital, and without the risk of liability beyond the loss of such joint stock or capital. But the legislature never contemplated an extension of limited liability to sole traders or to a fewer number than seven. In truth, the legislature clearly intended to prevent anything of the kind, for s. 48 takes away the privilege conferred by the Act from those members of limited companies who allow such companies to carry on business with less than seven members; and by s. 79 the reduction of the number of members below seven is a ground for winding up the company. Although in the present case there were, and are, seven members, yet it is manifest that six of them are members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the legislature intended not to be done; and, ingenious as the scheme is, it cannot have the effect desired so long as the law remains unaltered. This was evidently the view taken by Vaughan Williams J.

The incorporation of the company cannot be disputed. (See s. 18 of the Companies Act, 1862.) Whether by any proceeding in the nature of a *scire facias* the Court could set aside the certificate of incorporation is a question which has never been considered, and on which I express no opinion; but, be that as it may, in such an action as this

the validity of the certificate cannot be impeached. The company must, therefore, be regarded as a corporation, but as a corporation created for an illegitimate purpose. Moreover, there having always been seven members, although six of them hold only one 1/7 share each, Mr. Aron Salomon cannot be reached under s. 48, to which I have already alluded. As the company must be recognized as a corporation, I feel a difficulty in saying that the company did not carry on business as a principal, and that the debts and liabilities contracted in its name are not enforceable against it in its corporate capacity. But it does not follow that the order made by Vaughan Williams J. is wrong. A person may carry on business as a principal and incur debts and liabilities as such, and yet be entitled to be indemnified against those debts and liabilities by the person for whose benefit he carries on the business. The company in this case has been regarded by Vaughan Williams J. as the agent of Aron Salomon. I should rather liken the company to a trustee for him — a trustee improperly brought into existence by him to enable him to do what the statute prohibits. It is manifest that the other members of the company have practically no interest in it, and their names have merely been used by Mr. Aron Salomon to enable him to form a company, and to use its name in order to screen himself from liability. This view of the case is quite consistent with *In re George Newman & Co.*<sup>1</sup> In a strict legal sense the business may have to be regarded as the business of the company; but if any jury were asked, Whose business was it? they would say Aron Salomon's, and they would be right, if they meant that the beneficial interest in the business was his. I do not go so far as to say that the creditors of the company could sue him. In my opinion, they can only reach him through the company. Moreover, Mr. Aron Salomon's liability to indemnify the company in this case is, in my view, the legal consequence of the formation of the company in order to attain a result not permitted by law. The liability does not arise simply from the fact that he holds nearly all the shares in the company. A man may do that and yet be under no such liability as Mr. Aron Salomon has come under. His liability rests on the purpose for which he formed the company, on the way he formed it, and on the use which he made of it. There are many small companies which will be quite unaffected by this decision. But there may possibly be some which, like this, are mere devices to enable a man to carry on trade with limited liability, to incur debts in the name of a registered company, and to sweep off the company's assets by means of debentures which he has caused to be issued to himself in order to defeat the claims of those who have been incautious enough to trade with the company without perceiving the trap which he has laid for them.

It is idle to say that persons dealing with companies are protected by s. 43 of the Companies Act, 1862, which requires mortgages of limited companies to be registered, and entitles creditors to inspect the

<sup>1</sup> [1895] 1 Ch. 674.

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*This is repeated by Mr. Salomon in C.C. 40.*  
 register. It is only when a creditor begins to fear he may not be paid that he thinks of looking at the register; and until a person is a creditor he has no right of inspection. As a matter of fact, persons do not ask to see mortgage registers before they deal with limited companies; and this is perfectly well known to every one acquainted with the actual working of the Companies Acts and the habits of business men. Mr. Aron Salomon and his advisers, who were evidently very shrewd people, were fully alive to this circumstance.

If the legislature thinks it right to extend the principle of limited liability to sole traders it will no doubt do so, with such safeguards, if any, at it may think necessary. But until the law is changed such attempts as these ought to be defeated whenever they are brought to light. They do infinite mischief; they bring into disrepute one of the most useful statutes of modern times, by perverting its legitimate use, and by making it an instrument for cheating honest creditors.

Mr. Aron Salomon's scheme is a device to defraud creditors.

*Sale of (rescinded)*  
 Agreeing as I do in substance with Vaughan Williams J., I do not think it necessary to investigate the question whether the so-called sale of the business to the company ought to be set aside. The only object of setting it aside is to obtain assets wherewith to pay the creditors, and this object can be attained on sound legal principles by the order which he has made. In the event, however, of this case going further, I will add that I regard the so-called sale of the business to the company as a mere sham, and that in my opinion it might, if necessary, be set aside by the company in the interest of its creditors, although all the shareholders, such as they were, knew of and assented to the arrangement. They were simply assisting Mr. Aron Salomon to carry out his scheme. I cannot regard *In re British Seamless Paper Box Co.*<sup>1</sup> as an authority against a rescission of such a transaction as this.

We have carefully considered the proper form of order to be made on this appeal, and the order of the Court will be as follows: The Court, being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and, further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures, dismiss the appeal of Aron Salomon with costs; and, it being unnecessary to make any order on the liquidators' cross-notice of appeal, discharge the order directing the liquidator to pay costs of the counter-claim, and give him those costs.

LOPES L. J. This is a case of very great importance, and I wish shortly to state my reasons for concurring in the judgment just delivered. I do not propose to restate the facts so fully and clearly

<sup>1</sup> 17 Ch. D. 467.

detailed by Lindley L. J. : I shall content myself with shortly stating the impression they have produced on my mind. The incorporation of the company was perfect — the machinery by which it was formed was in every respect perfect, every detail had been observed ; but, notwithstanding, the business was, in truth and in fact, the business of Aron Salomon ; he had the beneficial interest in it ; the company was a mere *nominis umbra*, under cover of which he carried on his business as before, securing himself against loss by a limited liability of 1*l*. per share, all of which shares he practically possessed, and obtaining a priority over the unsecured creditors of the company by the debentures of which he had constituted himself the holder.

It would be lamentable if a scheme like this could not be defeated. If we were to permit it to succeed, we should be authorizing a perversion of the Joint Stock Companies Acts. We should be giving vitality to that which is a myth and a fiction. The transaction is a device to apply the machinery of the Joint Stock Companies Act to a state of things never contemplated by that Act — an ingenious device to obtain the protection of that Act in a way and for objects not authorized by that Act, and in my judgment in a way inconsistent with and opposed to its policy and provisions. It never was intended that the company to be constituted should consist of one substantial person and six mere dummies, the nominees of that person, without any real interest in the company. The Act contemplated the incorporation of seven independent bonâ fide members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader. To legalize such a transaction would be a scandal.

But to what relief is the liquidator entitled ? In the circumstances of this case it is, in my opinion, competent for the Court to set aside the sale as being a sale from Aron Salomon to himself — a sale which had none of the incidents of a sale, was a fiction, and therefore invalid ;<sup>2</sup> or to declare the company to be a trustee for Aron Salomon, whom Aron Salomon, the cestui que trust, was bound to indemnify ;<sup>3</sup> or to declare the formation of the company, the agreement of August, 1892, and the issue of the debentures to Aron Salomon pursuant to such agreement, to be merely devices to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further, to enable him to obtain a preference over other creditors of the company by obtaining a first charge on the assets of the company by means of such debentures. I wish to add that I am inclined to think that a scire facias would go to repeal the certificate of incorporation ; but I express no decided opinion on the point. The appeal will be dismissed with costs.

[KAY L. J. delivered a concurring opinion.]



The Court discussed no policy but founded its decision on the language of the act. Nothing was here requiring that the subscriber to the memo should be independent or unconnected or should have a substantial interest in the Co. or should have a mind or will of their own "Exp."

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BRODERIP v. SALOMON.

From the above decision, Salomon appealed to the House of Lords. His appeal was brought in *forma pauperis*.

LORD HERSCHELL. [After stating the facts, and reciting the previous proceedings.]

It is to be observed that both courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circumstances, I am at loss to understand what is meant by saying that A. Salomon and Company Limited is but an *alias* for A. Salomon. It is not another name for the same person; the company is *ex hypothesi* a distinct legal *persona*. As little am I able to adopt the view that the company was the agent of Salomon to carry on his business for him. In a popular sense a company may in every case be said to carry on business for and on behalf of its shareholders, but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled substantially to the whole of the profits. The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess.

The Court of Appeal based their judgment on the proposition that the formation of the company, and all that followed it, was a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act 1862. The conclusion which they drew from this premiss was, that the company was a trustee and Salomon their *cestui que trust*. I cannot think that the conclusion follows even if the premiss be sound. It seems to me that the logical result would be that the company had not been validly constituted, and therefore had no legal existence. But, apart from this, it is necessary to examine the proposition on which the court have rested their judgment, as its effect would be far reaching. Many industrial and banking concerns of the highest standing and credit have, in recent years, been, to use a common expression, converted into joint stock companies, and often into what are called "private" companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced "schemes to enable" them "to carry on business in the name of the company, with limited liability," in the very sense in which those words are used in the judgment of

See 56 AC

But the latter is no wrong

*Halbury. They [the judges] have been struck by what they have considered the  
inepiderency of permitting one man to be in influence and authority the whole Co  
& assuming that such a thing had not have been intended by the law. They have  
sought various fids on which they might rest - each some prohibition, such a re  
sult. Whether such a result be right or wrong, politic or  
impolitic I say with the utmost deference, learned judges, that we have nothing*

BRODERIP v. SALOMON.

the Court of Appeal. The profits of the concern carried on by the company will go to the persons whose business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company, and the transfer to it of the business, is that, whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. In no other respect is it intended that there shall be any difference; the conduct of the business and the division of the profits are intended to be the same as before. If the judgment of the Court of Appeal be pushed to its logical conclusion all these companies must, I think, be held to be trustees for the partners who transferred the business to them, and those partners must be declared liable, without limit, to discharge the debts of the company. For this is the effect of the judgment as regards the respondent company. The position of the members of a company is just the same whether they are declared liable to pay the debts incurred by the company, or by way of indemnity to furnish the company with the means of paying them. I do not think that the learned judges in the court below have contemplated the application of their judgment to such cases as I have been considering, but I can see no solid distinction between those cases and the present one.

It is said that the respondent company is a "one-man" company, and that in this respect it differs from such companies as those to which I have referred. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been clerks or other persons who possessed little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided in each case the requirements of the statute have been complied with, and the company has been validly constituted. How does it concern the creditor whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person who practically takes the whole of the profits? The creditor has notice that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact. The creditors in the present case gave credit to and contracted with a limited company; the effect of the decision is to give them the benefit as regards one of the shareholders, of unlimited liability. I have said that the liability of persons carrying on business can only be limited provided the requirements of the statute be complied with, and this leads naturally to the inquiry what are those requirements?

The Court of Appeal has declared that the formation of the respondent, *to do c that gn if BroCo has been duly constituted by law*

ent company and the agreement to take over the business of the appellant, were a scheme "contrary to the true intent and meaning of the Companies Act." I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share. The shares may, however, be of as small a nominal value as those who form the company please; the statute prescribes no minimum, and though there must be seven shareholders, it is enough if each of them holds one share, however small its denomination. The Legislature therefore clearly sanctions a scheme by which all the shares, except six, are owned by a single individual, and these six are of a value little more than nominal.

It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion it makes no difference. The statute forbids the entry in the register of any trust, and it certainly contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum or who have agreed to become members of the company, and whose names are on the register, are alone regarded as, and, in fact, are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share involves. Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do; it concerns only them and their *cestui que trust* if they have any. If, then, in the present case all the requirements of the statute were complied with, and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act?

It may be that a company constituted like that under consideration was not in the contemplation of the Legislature at the time when the Act authorizing limited liability was passed; that if what is possible under the enactments as they stand had been foreseen, a minimum sum would have been fixed as the least denomination of share permissible, and it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company, and how it is held.

Ex Reg 212, 315, 316.

*In the original appeal, order appealed from reversed.*

*In the cross appeal, order appealed from affirmed.*

## BANK OF UNITED STATES v. DEVEAUX ET AL.

1809. 5 Cranch, U. S. 61.<sup>1</sup>

ERROR to the U. S. Circuit Court for the District of Georgia.

The declaration describes the plaintiffs as "The President, Directors and Company, of the Bank of the United States, . . . established under an act of congress. . . ." At the close of the declaration is the following allegation: "And your petitioners aver that they are citizens of the State of Pennsylvania, and the said Peter Deveaux and Thomas Robertson are citizens of the State of Georgia."

Plea in abatement, denying the jurisdiction of the U. S. Circuit Court. Demurrer. Judgment for defendants upon the demurrer.

*Binney and Harper*, for plaintiffs in error.

*P. B. Key*, and *Jones*, *contra*.

MARSHALL, C. J. Two points have been made in this cause.

1. That a corporation composed of citizens of one State may sue a citizen of another State in the federal courts.
2. That a right to sue in those courts is conferred on this bank by the law which incorporates it.

The last point will be first considered. . .

[The court holds, that no right is conferred on the bank, by the act of incorporation, to sue in the federal courts.]

2. The other point is one of much more difficulty.

The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, "to controversies between citizens of different States," both parties must be citizens to come within the description.

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union.

The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

*that act*

A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States. Aliens, or citizens of different States, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.

Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different State from the defendant to sue in the national courts. It is by a course of acute metaphysical and abstruse reasoning, which has been most ably employed on this occasion, that this opinion is shaken.

As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character. It is defined as a mere creature of the law, invisible, intangible, and incorporeal. Yet, when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.

There is a case, however, reported in 12 Mod. 669, which is thought precisely in point. The corporation of London brought a suit against Wood, by their corporate name, in the mayor's court. The suit was brought by the mayor and commonalty, and was tried before the

mayor and aldermen. The judgment rendered in this cause was brought before the court of king's bench and reversed, because the court was deprived of its jurisdiction by the character of the individuals who were members of the corporation.

In that case the objection that a corporation was an invisible, intangible thing, a mere incorporeal legal entity, in which the characters of the individuals who composed it were completely merged, was urged and was considered. The judges unanimously declared that they could look beyond the corporate name, and notice the character of the individual. In the opinions, which were delivered *seriatim*, several cases are put which serve to illustrate the principle and fortify the decision.

The case of *The Mayor and Commonalty v. Wood* is the stronger because it is on the point of jurisdiction. It appears to the court to be a full authority for the case now under consideration. It seems not possible to distinguish them from each other.

If, then, the congress of the United States had in terms enacted that incorporated aliens might sue a citizen, or that the incorporated citizens of one State might sue a citizen of another State, in the federal courts, by its corporate name, this court would not have felt itself justified in declaring that such a law transcended the constitution.

The controversy is substantially between aliens, suing by a corporate name, and a citizen, or between citizens of one State, suing by a corporate name, and those of another State. When these are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person capable of being a citizen or an alien, who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself and sues in his own right. But in this case the corporate name represents persons who are members of the corporation.

If the constitution would authorize congress to give the courts of the Union jurisdiction in this case, in consequence of the character of the members of the corporation, then the Judicial Act ought to be construed to give it. For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name.

That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the Registering Act. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.

The court feels itself authorized by the case in 12 Mod. (on a question of jurisdiction), to look to the character of the individuals who compose the corporation, and they think that the precedents of this

court, though they were not decisions on argument, ought not to be absolutely disregarded.

If a corporation may sue in the courts of the Union, the court is of opinion that the averment in this case is sufficient.

Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.

*Judgment reversed; plea in abatement overruled, and cause remanded.*

[In 1806, the Supreme Court, in *Strawbridge v. Curtiss*, 3 Cranch (U. S.), 267, decided that, where there are two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the U. S. courts, in order to support the jurisdiction. *Strawbridge* was a citizen of Massachusetts. One of the defendants was a citizen of Vermont; the other defendants were citizens of Massachusetts. *Held*, that the U. S. court had not jurisdiction.

A logical application of the combined principles of *Strawbridge v. Curtiss* and *Bank v. Deveau* was made in *Commercial, &c., Bank of Vicksburg v. Slocomb* (A. D. 1840), 14 Peters, 60. The plaintiffs, citizens of Louisiana, brought an action in the U. S. Circuit Court for the Southern District of Mississippi against a Mississippi corporation. The defendant pleaded that two of the members of the corporation were citizens of Louisiana. It was held, that, upon the facts thus pleaded, the court had not jurisdiction; the court saying (in effect) that all the corporators must be citizens of a different State from the opposite party.]

*122 R. 522*

### § WASHINGTON INSURANCE CO. v. PRICE.

1823. 1 *Hopkins, N. Y. Chancery Reports*, 1.

[BEFORE SANFORD, Chancellor.]

Sanford, Chancellor, was a stockholder in the Washington Insurance Company, and he declined to hear the cause, expressing himself as follows:—

The sole judge of this court, being a stockholder in the incorporated company which institutes this suit, can he proceed or act as judge in the cause?

It is a maxim of every code, in every country, that no man should be judge in his own cause. . . .

But it has been said, that where a court consisting of a single judge, has exclusive jurisdiction of the subject of a suit, a failure of justice would take place if the judge should not act in his own cause.

A failure of justice may take place if he should not act; as it also may occur if he should decide his own cause: but it belongs to the power

ccP. <sup>127</sup> Challenges for cause may be taken on one or more of following grounds. (1) - a pt in bus. con-  
standing in the relation of partner, master, employer, debtor, or creditor to either  
party or, as in a corp. wh. is a party, or being a member or family member of either party;  
or a pt in bus. c either party; or surety on any bond or oblig. either party, or being  
the holder of bonds or shares of a corp. wh. is a party.

WASHINGTON INS. CO. v. PRICE, 1 Cap St. of 63 corp. wh. is a party

which created such a court to provide another in which this judge may be a party; and whether another tribunal is established or not, he at least is not entrusted with authority to determine his own rights or his own wrongs.

By the third section of the act concerning the court of chancery, it is provided, "That where the chancellor shall be a party to a suit in chancery, the bill shall be filed before the chief Justice of the state, who shall thereupon proceed, in like manner, as the chancellor could of right do, as a court of chancery in other cases, and the court of chancery shall be thereupon held in that case before the chief Justice, and shall proceed to hear and determine the same, according to the course and usage of the said court."

what happens if Ch refuses to try case

In this case, an incorporated company sues by its corporate name. The company consists of persons who are joint proprietors of a common fund in various amounts; the suit is the act of these persons or their officers; and the gain or loss which may result from it will be the gain or loss of each stockholder, according to the extent of his interest in the fund. The corporation is the party in form; the stockholders are the parties in substance. When a corporation is thus a party to a suit, it is regarded as one sole party, so long as it is not necessary to the ends of justice that the persons who use the corporate name should be disclosed. But whenever the ends of justice require that the persons who use the name of a corporation should be known, the inquiry is made, and the stockholders and their officers are considered and treated as they are in fact, the real litigants in the suit.

[The learned Chancellor then discusses the meaning of the term "party" in the statute, and concludes that the provision] extends to all cases in which the chancellor is a party to a suit, and, as I conceive, to all cases in which, though neither complainant nor defendant, he is a real party to the subject of litigation.

Such is my own view of this question; but it appears that my immediate predecessor, and the late chief Justice, held a different opinion. Their opinion is found in the case of *Stewart v. The Mechanics and Farmers' Bank*, 19 John. 501. In that case, the chancellor was a stockholder in the bank; and this fact appearing, the parties consented that the hearing of the cause should proceed. Upon a consultation between the chancellor and the chief Justice, they were both of opinion that the chancellor was not a party to the suit within the provision of the statute; and the chancellor proceeded to determine the cause. The same cause was removed to the court of errors; but this question was not raised or considered in that court. It is a question which has not been determined by the court of errors; but it has been decided by the opinions of two of our most eminent judges. I have the highest respect for the late chancellor, and the late chief Justice. I delight to honor them for the ability, intelligence, and integrity with which they discharged their respective trusts; and I feel that I have strong authority, when I am able to produce their opin-



ions in support of my own decisions. But where my own judgment is clear and undoubting, I cannot surrender it to any opinion except that of a superior tribunal.

My opinion is, that the chancellor is a party to a suit in this court by or against a corporate company, in which he is a stockholder; that such a suit is his own cause, to the extent of his interest as a stockholder; and that he cannot determine such a suit. I am also of opinion, that the chief Justice has jurisdiction of such suits; and the circuit courts are now also open as courts of equity.

This suit having been instituted before I was chancellor, I merely direct at present, that all proceedings in it before me cease. If the suit shall proceed before the chief Justice, it will be determined, as if it had been commenced before him, according to the statute.

ccp  
170 No justice. judge re shall put or act as such in any act or proceeding to which he is a party or in which he is interested. - applies Adams v. Benson  
121 Cal 372 - disqualify judge who is a stockholder in a bank which holds a part of estate in, det bonds upon a valid title he is called to act

UNITED STATES v. MILWAUKEE REFRIGERATOR  
TRANSIT CO. ET AL.

1905. 142 Fed. 247.

See findings to prevent payment of rebates  
Demurrer. alleged rebates were not paid back to shipper but to Transit Co & this is a payment a comm. to a soliciting agent.  
SANBORN, District Judge. This is a bill in equity for an injunction to prevent the payment of alleged rebates on freight, brought under Elkins Act, February 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]. The defence outlined in argument of the demurrers is that it appears on the face of the bill that the alleged rebates were not paid back to the shipper (the brewing company), but to the Refrigerator Transit Company, and, in substance and effect, nothing more is shown than the payment to a soliciting agent (the transit company) of a commission of an eighth or tenth of the published tariff rates, thus showing, in real effect, acts neither unlawful, immoral, nor injurious. A motion is also made on behalf of the brewing company to strike out certain allegations averring prior and disconnected illegal acts on its part, said to be material in proof, to characterize the acts of its principal officers and managers in organizing the transit company, and rebut the theory that the moneys paid by the carriers to the transit company were paid as commissions for obtaining the business and not as prohibited rebates.

The provisions of section 10 of the interstate commerce act, the act of 1889 (Act March 2, 1889, 25 Stat. 857 [U. S. Comp. St. 1901, p. 3160]), and the Elkins Act, may be thus summarized:—

Section 10, Interstate Commerce Act.

Common carriers, and the officers of such as are corporations, receivers, agents, etc., of such corporations, are prohibited from giving rebates, preferences, and advantages, and making unjust discriminations, and are punishable by fine and imprisonment. Under this sec-

tion only the agents of corporate carriers, and not the carriers themselves, were punishable. *U. S. v. Mich. Cent. R. Co.*, (D. C.) 43 Fed. 26.

#### Act of 1889.

Agents of carriers: Any common carrier, and officers and agents of corporation carriers, who by means of false billing, classification, weighing, or other device or means, shall assist, suffer, or permit any one to obtain transportation at less than established rates, shall be guilty of a misdemeanor, punishable by fine and imprisonment.

Shippers: Any person or corporation agent shipping property, who shall knowingly, by false billing, classification, etc., or other device or means, with or without the carrier's consent or connivance, obtain carriage at less than such established rates, shall be deemed guilty of fraud, declared to be a misdemeanor, punishable by fine and imprisonment.

Bribery to obtain unjust discrimination: Any such person, officer, etc., who shall by paying money or thing of value, or by solicitation, induce a carrier to discriminate unjustly in his favor as against other shippers, or aid or abet such discrimination, he shall be deemed guilty of a misdemeanor, punishable by fine and imprisonment.

Tort action: Shippers discriminated against are given action for damages against such person, officer, etc., as well as the carrier.

Corporation carriers themselves, it will be noticed, are not within the penalties of these acts; and the defence that the supposed discrimination was made not under like circumstances and conditions was always available.

#### Elkins Act of 1903.

Corporation carriers are made liable to the same extent as were their agents under the earlier statutes, but subject to fine only, not imprisonment. Their wilful failure to publish tariffs or rates, or strictly observe them, is a misdemeanor punishable by fine. It is made unlawful and punishable for any person or corporation to offer, grant, or give, or to solicit, accept, or receive, or offer so to do, any rebate, concession, or discrimination in respect of transportation in interstate or foreign commerce by common carriers within the former statutes, whereby any such property shall, by any device whatever, be carried at less than the published tariff rate. Offences under the earlier acts, followed by convictions after this act, are punishable only by fine. The acts or omissions of agents are deemed the acts or omissions of the carrier also. The published rate is made conclusive, and any departure therefrom punishable. Suits in equity by the commission, as well as those directed by the Attorney-General, are authorized, and the provisions of the expedition act and anti-trust act are made applicable. It will be observed that this act makes the corporation carriers themselves liable, eliminates the question of like circumstances and conditions by making the published rate conclusive, and abolishes punishment by imprisonment.

*Relev Stat*

*effect*

In effect the bill in this case is claimed to charge the creation by a shipper of a dummy corporation as a device to cover rebates on large shipments of beer in interstate and foreign traffic. The carriers which are charged with paying the rebates are joined as defendants, and some of them have filed general demurrers for want of equity in the bill. The Pabst Brewing Company has also moved to strike out the following paragraph:—

"That until the passage and promulgation of the act of Congress entitled 'An act to further regulate commerce with foreign nations and states,' approved February 19, 1903, said defendant Pabst Brewing Company had, through the agency of said Gustav G. Pabst and Frederick Pabst, habitually received from many of the railroads and common carriers, which so transported the beer and other articles so shipped by it from the State of Wisconsin into foreign countries and states other than Wisconsin, rebates and concessions and other discriminations."

The bill, after stating that the Pabst Brewing Company, Milwaukee Refrigerator Transit Company, and Wisconsin Central Railway Company are Wisconsin corporations, and the other defendants foreign corporations, that the Attorney-General has directed these proceedings, that the shipments originate in Milwaukee and continue in other states and countries, contains the following allegations, here given in brief outline (the figures refer to the numbered paragraphs of the bill):—

(11) The transit company was, on October 7, 1903, organized, *inter alia*, to operate refrigerator cars on defendants' and other lines. It owns or controls 540 such cars. It was conceived, and is operated, as defendants' carriers well knew, as a device to cover the receiving of rebates, concessions, and discriminations, to wit, an eighth or tenth of the published rate; whereby the traffic is carried at less than published rates. Such rebates are paid and accepted under the pretence, claim, and guise of "commissions," and amount to large sums to complainants unknown.

(12) The transit company was incorporated by procurement of the attorneys of the brewing company, and at its instance and request, with a capital of \$150,000, having five directors, and with power to acquire and operate refrigerator cars, and contract for the supply and operation of refrigerator transportation by land and water.

(13) The brewing company is a Wisconsin corporation operating a large brewery, and selling and shipping beer into all the states and territories and to purchasers in foreign countries. It has a capital of \$10,000,000 or 10,000 shares. Gustav Pabst and Fred Pabst are brothers, owning 2000 shares, and with their mother and sisters over half of the stock. They vote and control a majority of the stock, and have always directed and controlled the election of directors, and their action; they have been and are its president, vice-president, and general managers, and have always controlled all its sales, purchases, and shipments.

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(14) (Here occurs the passage above quoted as to rebates prior to the Elkins Act.) Upon the passage of that act the brewing company was no longer able to directly secure rebates, and cast about for some device to evade the statute, and the Pabsts, as such officers, and one Howe, as traffic manager, intending to contrive and operate a device for such evasion, caused the transit company to be formed. Of its 1500 shares, 1340 were issued to the two Pabsts, 35 shares to Fred Pabst's wife, and the balance to dummy directors, to give color to the claim that its stock was not owned by the brewing company. After investigation by the interstate commerce commission in May, 1905, Gustav Pabst transferred his stock in the transit company to Fred Pabst, and had some person elected director in his place; but such acts were colorable merely, he still retaining a large pecuniary interest in the corporation, and participating in its control.

(15) Immediately on the creation of the transit company the Pabsts, as controlling officers of the brewing company, contracted with themselves as executive officers of the transit company, for a term not yet expired, to give the latter exclusive control of the shipment of all freight of the brewing company moving in interstate and foreign commerce, which it is still exercising. The contract was made to enable the transit company to route the shipment of such freight on the lines of such companies as will pay rebates, and withhold it from such as will not; and all the rebates, concessions, and discriminations charged in the bill have been exacted by threats of such diversion. Many thousand tons of said freight have been hauled by defendant carriers since the contract was made. On such shipments the brewing company pays to the carriers the full tariff rate, and the carriers pay the transit company for use of its refrigerator cars for mileage three fourths of a cent to a cent per mile, and in addition an eighth or tenth of the sums paid them by the brewing company; and in every instance the property is transported by defendant carriers at an eighth or tenth less than the published tariff. Such rebates amount to many thousands of dollars, the exact sum unknown to complainants.

(16) All the defendant carriers well knew that the transit company was organized in the interest of the brewing company, and for the purpose of evading the law, and paid such rebates with the like purpose and intent.

(18) The transit company claims and pretends that such repayments were made and accepted as compensation for its services in soliciting and procuring freight for carriage by defendants; but such claim or pretence is untrue. The transit company has entire control of all the shipping business of the brewery, comprising almost the entire business of the transit company, which it does not solicit; the only possible consideration moving from it to the carrier being its refraining to divert the business. All such repayments have always been known to all said parties to be a device for unlawful rebate, concession, and discrimination. But such payments constitute unlawful concession

and discrimination, whether or not the transit company solicits the shipments, which, if not so solicited and procured, would be diverted from the carrier so paying.

[After disposing of another point.] It is further essential, to bring the case within the law, that the repayments be made to the brewing company, or for its benefit, directly or indirectly, and not merely to third persons for obtaining the business; otherwise the repayment is no more than a salary or other expense incident to the carrier's business. The remaining question, then, is whether this is sufficiently shown in the bill. It is forcibly argued that the bill carefully avoids the statement that the brewing company received the money repaid, or even that it was paid back for its benefit; and that the two corporations are not only distinct legal entities, but have different stockholders. The bill shows the creation, by the controlling interests of the brewing company, of a dummy corporation, with dummy directors, and *scienter* of its character by the carriers, with intent to evade the law. It is argued that these averments show that the transit company is merely the *alter ego* of the brewing corporation; both being substantially identical in interest and control, and the brewing company the ultimate beneficiary, in some form, of the operations in question. Now is not this the usual device of a shipper securing discrimination by manipulation of carriers in which it is interested?

That the transit company is controlled by the managing agents of the brewing company is entirely clear. But is it controlled by the shipper corporation? [The solution of this question depends on whether the brewing corporation, in a case like this, is an association of individuals, rather than a legal entity apart from those who own and control it.] No doubt the general rule that a corporation is a legal entity, an institution, artificial, intangible, existing only by legal contemplation, and separate and apart from its constituents, is firmly imbedded in the common law of this country. It has been so laid down in hundreds of cases. In the Dartmouth College Case Chief Justice Marshall adopted and expressed it, almost in the exact language of Lord Coke, in Coke on Littleton, 27b; and this definition has been universally approved, especially in cases involving the extent of the corporate powers.

It is, however, most significant that the Supreme Court of the United States was the first to break away from the notion that a corporation is only a legal entity, when its literal application would operate with injustice. If a corporation is only a legal entity, of course, it cannot be a citizen of a state. Hence the Supreme Court, in order to sustain the most important and far-reaching jurisdiction of the national courts over corporations, depending on the citizenship of the parties, was obliged to adopt some other theory of corporate constitution than that laid down by the great chief justice. This was accomplished by holding that a corporation is an association of persons who may have citizenship, and following this with the adoption

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of a fiction of law, supported by a conclusive presumption, by which the members of a corporation are conclusively presumed to be citizens of the state creating it. *Hope Ins. Co. v. Boardman*, 5 Cranch, 57, 3 L. Ed. 36; *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353; *Marshall v. R. Co.*, 16 How. 314, 14 L. Ed. 953. In reaching these results, the court, in answering the argument that a corporation is an artificial person, a mere legal entity, invisible and intangible, said that it was not reasonable that those who deal with corporate affairs or agents should be deprived of the valuable privilege of litigating in the federal courts by a syllogism, or rather sophism which deals subtly with words and names, without regard to the things or persons they are used to represent. 16 How. 327, 14 L. Ed. 953. "For all purposes of acting, contracting, and judicial remedy," said Mr. Justice Grier, "they can speak, act, and plead only through their representatives or curators." *Id.* Thus the idea that a corporation is, for some purposes, an aggregation of individuals, and not a legal entity, was adopted, through a fiction of law, and given full effect. It was the same kind of fiction by which the English Court of Exchequer usurped jurisdiction by permitting an allegation that plaintiff was the king's debtor, and then allowing no one to deny it.

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But when the case of a consolidated corporation incorporated in two or more states, having the same stockholders, arose, the Supreme Court partially returned to the rule that a corporation is a legal entity, existing only in contemplation of law. And it was held that there are as many corporations as there are states in which the same group of persons is incorporated. In each of such states it is conclusively presumed that the shareholders are, for jurisdictional purposes, citizens of that state alone. Hence, a citizen of Illinois cannot in Illinois sue in a federal court the Chicago & Northwestern Railway Company, consolidated by incorporation in both Illinois and Wisconsin; but he may do so in Wisconsin. *Railroad Co. v. Wheeler*, 1 Black, 286, 17 L. Ed. 130; *Railway Co. v. Whitton*, 13 Wall. 270, 283, 20 L. Ed. 571. This result was reached by applying the rule that the legal entity existing by force of law can have no existence beyond the state or sovereignty which brings it into life and induces it with its faculties and powers. *Id.* "It is true that for certain purposes the law will recognize the corporation as an entity distinct from the individual stockholders; but that fiction is only resorted to for the purpose of working out the lawful objects of the corporation. It is never resorted to when it would work an injury to any one, or allow the corporation to perpetrate a fraud upon anybody." Held that stock in one corporation directed by another corporation to be issued to the stockholders of the latter, and paid for by it, was in reality received by the corporation. *The Sportsman Shot Co. v. American Shot & Lead Co.*, (Superior Court of Cincinnati) 30 Wkly. Law Bul. 87; *State v. Standard Oil Co.*, 49 Ohio St. 137, 177, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541. "The abstract idea of a corporation, the legal

entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action and agency?" *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 621, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843. "A corporation is an artificial person, created by law as the representative of those persons, natural or artificial, who contribute to and become the holders of shares in the property intrusted to it for a common purpose. . . . It is exclusively the work of the law." *In re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276, 281. "Corporations are but associations of individuals." *Hightower v. Thornton*, 8 Ga. 492, 52 Am. Dec. 412; 1 Kyd on Corp. 13. "Who, in law, constitute the company, if it be not the stockholders?" *Gelpcke v. Blake*, 19 Iowa, 268. "A private corporation is, in fact, but an association of individuals united for a lawful purpose and permitted to use a common name in their business, and to have a change of members in their business." Field, J., in *Kansas Pacific v. Atchison Railroad*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794. On the other hand, when dealing with the question of corporate power, the Supreme Court has gone so far as to hold that a contract *ultra vires* of the corporation, although assented to by all the stockholders, is void. *Oregon Railway & Navigation Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837.

A stockholder owning nearly all the stock cannot bind the corporation by a contract made in his individual capacity. *Donoghue v. I. & L. M. Ry. Co.*, 87 Mich. 13, 49 N. W. 512; *Finley Shoe & Leather Co. v. Kurtz*, 34 Mich. 89; *England v. Dearborn*, 141 Mass. 590, 6 N. E. 837. It seems that an act of all the stockholders, as individuals, binds the corporation, as no one can object. *Bundy v. Iron Co.*, 38 Ohio St. 300 (mortgage by all but one stockholder, to the remaining one, of corporate property, executed in the individual names of the stockholders, held valid). A corporation, from one point of view, may be considered an entity, without regard to its shareholders, yet the fact remains self-evident that it is not in reality a person or thing distinct from its consistent parts. The word corporation is but a collective name for the members who compose the association. *Home Fire Ins. Co. v. Barber*, (Neb.) 93 N. W. 1024, 60 L. R. A. 927; *City of Nashville v. Ward*, 16 Lea, 27; *People v. North River, etc., Co.*, (Sup.) 3 N. Y. Supp. 401, 2 L. R. A. 33; *Ford v. Chicago Milk Shippers' Ass'n*, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298; *First Nat. Bk. v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834; *Buffalo Loan, etc., Co. v. Medina Gas, etc., Co.*, (Sup.) 42 N. Y. Supp. 781. (If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the

notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. This much may be expressed without approving the theory that the legal entity is a fiction, or a mere mental creation; or that the idea of invisibility or intangibility is a sophism. A corporation, as expressive of legal rights and powers, is no more fictitious or intangible than a man's right to his own home or his own liberty.

Applying the rule here laid down to the circumstances shown by surround the brewing company and transit company, can it be doubted that there really is, in substance and effect, an identity of interest, or that the brewing company, considered as an association of individuals, really owns and fully controls the transit company? Or that the payment of the eighth or tenth of the rate is in reality, and in some form, a payment to, or for the benefit of, the shipper? I think sufficient is alleged to show this. Moreover, it clearly appears that the shipper practically controls the transit company, and I think this shows a sufficient identity of interest among the shareholders of both in these repayments to make them rebates, if paid and received with unlawful intent. It is said that the procurement of the shipments through the contract is the mere soliciting of them for the carriers, for which they are lawfully authorized to pay a part of the rate, in order to get the business; and the transit company, owning a large number of refrigerator cars, and wishing to keep them employed, simply gives the freight to those competing shippers who will make the best terms, the business being of great volume, and the sums paid for freights large. But this theory of innocence is exploded by the fact, as alleged (whatever the actual proof may show), that the transit company is a mere separate name for the brewing company, being in fact the same collection of persons and interests. Assuming the truth of the averments, the device adopted is "neither new, nor deserving of new success." As the patent lawyers say of an aggregation, there is no new mode of operation, new use, or new result — simply the use of old things in a different situation.

There is, no doubt, some tendency in these days to accept general and vague charges of wrong-doing on the part of the corporations at a premium. Much has happened to arouse public feeling on this sensitive subject. For many years transportation development was encouraged in every possible way. The municipal aid craze was an early form of such stimulation. Praise for those who were seeking command of the trade of the world was unstinted and without dissent, and criticism forgotten. But now that we are beginning to feel the tyranny of arbitrary and overwhelming industrial and commercial power, the tendency is to go to the other extreme, and it becomes easy to excite prejudice leading to injustice. The courts will no doubt be somewhat influenced by such tendency; but so far as possible it is for them to keep fundamental rules steadily in view, and with dis-

*Accepted passage quoted with approval 1907 68909 1917  
Justice Ross (R.G.)*

*See:*

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crimination and careful reflection see to it that injustice is prevented. Joseph Cooke once facetiously said that he had never travelled in Pennsylvania, but had often visited the domains of the Pennsylvania Railroad Company. These and other like domains are now subject to widespread attack; but it will not be forgotten that they are our domains, and, if they are being despoiled, the spoliation is the work of our trustees, who must indeed be brought to book, but the trust property at the same time preserved.

*See (1904) 43 Am. Reg. 558 and other articles*

NORTHERN SECURITIES COMPANY v. UNITED STATES.

1903. 193 U. S. 197.

MR. JUSTICE HARLAN. Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine tenths of the stock of the Northern Pacific, and more than three fourths of the stock of the Great Northern, the stockholders of the companies who deliver their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held in one ownership. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole,

*Harlan 344 - very numerous 91 43 Ch. Cant. Truck a B. & O. corp. - not passages*  
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object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interest, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise . . . in restraint of commerce among the several states or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust"; but if not, it is a *combination in restraint of interstate and international commerce*; and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory.

The Circuit Court was undoubtedly right when it said—all the judges of that court concurring—that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 Fed. Rep. 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

And so on: It is proper to say in passing that the record tends to show that the N.S.C. had any reason to suspect that the two roads would be destroyed when organized, Sec. Co. to destroy competition & keep the earnings engaged in interstate commerce in a trust for the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purpose of those who had after some time secured the

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, "Why put the stocks of *both* these [constituent companies] into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of *custodian*, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies — such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States v. Joint Traffic Association*) "smothering" competition between the lines of two railway carriers.

MR. JUSTICE BREWER, concurring. I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States v. Freight Association*, 166 U. S. 290, followed by the cases of *United States v. Joint Traffic Association*, 171 U. S. 505, *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, and *Montague & Co. v. Lowry*, 193 U. S. 38, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included

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all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was levelled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall v. Great Northern Railway*, 161 U. S. 646, in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company: "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of \$400,000,000, had no means of its own; \$30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of

jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

30. Cases 20 U.S. 1. Trebein Co 22 U.S. 60

6BANK ET AL. v. TREBEIN ET AL.

1898. 59 Ohio St. 316.

MINSHALL, J. We are unable to see how, as against his creditors, the transaction by which F. C. Trebein, with his wife, his daughter, his son-in-law, and his brother-in-law, formed "The F. C. Trebein Company" and then conveyed to it every vestige of property he had not before conveyed, either to his wife or to his daughter, can be sustained, against the justice of their demand to have the property so transferred administered for the benefit of all his creditors under the insolvent laws of this state. He was at the time liable in a large sum of money on indorsements he had made for the accommodation of the Straw Paper Company, of which he was a member and one of its directors. He knew it was about to fail and that he would have to respond to these indorsements. This fact induced the conveyances he had before made to his wife and to his daughter, whether for a valid consideration or not, was not considered by the court for the reasons stated in its finding, that there were suits then pending to set them aside. The capital of The F. C. Trebein Company was fixed at \$60,000, divided into 600 shares of \$100 each, Trebein taking 596 of the shares and each of the other persons named taking *one* share. It was formed on January 22, 1895, Trebein being made the president, treasurer, and general manager, and he conveyed to the company the property in question, estimated to be worth \$60,000, and received therefor the shares above stated, and at once placed all of them, except one, in pursuance of his original purpose, with three of the banks who held his indorsements of the paper of the Straw Paper Company, for the purpose of securing them on his indorsements; and he continued in the control and management of the milling and grain business as he had before the corporation was formed and the conveyance made. The court found that this was all done in good faith. But, in view of the facts, we are unable to see how the court could have meant more

than that he meant no wrong by it. Good faith in law, however, is not to be measured always by a man's own standard of right, but by that which it has adopted and prescribed as a standard for the observance of all men in their dealings with each other. When one conveys all his property to another with the intention of hindering and delaying his creditors, or a part of them, in pursuing their legal remedies against him and his property, his conduct in law is deemed fraudulent, however honestly he may have intended to deal with all his creditors in the future. *Trimble v. Doty*, 16 Ohio St. 118. The good faith of a party under such circumstances must be determined by the legal effect of what he deliberately does. *Brinkerhoff v. Tracy*, 55 Ohio St. 558; *Lee v. Hennick*, 52 Ohio St. 177; *Gashe v. Young*, 51 Ohio St. 376, 389. The formation of the corporation and the conveyance to it by Trebein of all the property he then had, necessarily hindered and delayed all his creditors in the pursuit of their claims against him. The formation of the corporation in no way facilitated the transaction of his milling business and that connected with it. Nothing was added to his capital, unless we regard the few hundred dollars that may have been paid for the four shares of stock taken by the other members of his family such an addition. Evidently an addition to capital was not the controlling object. The transaction cannot be likened to a conveyance to a third person for a valuable consideration; considered in the light of the facts, it was no more than a conveyance from himself to himself. The corporation was in substance another F. C. Trebein. His identity as owner of the property was no more changed by his conveyance to the company than it would have been by taking off one coat and putting on another. He was as much the substantial owner of the property after the conveyance as before; and had substantially the same use of it as if the conveyance had not been made. The only purpose the creation of the corporation and the conveyance to it subserved, was to hinder creditors in levying upon the property and selling it on execution at law; and it is this hindrance the law will not permit, and, when ascertained in a proper proceeding, requires the conveyance to be set aside and the property administered for the benefit of all the creditors of the fraudulent grantor.

It is suggested that the property may be levied on. This is true, but it cannot be sold on execution until the conveyance is set aside; for it is not the policy of the law to sell a law suit. It is also suggested that the stock of Trebein may be reached by a proceeding provided by statute. This is true, but it is not the simple proceeding of an execution at law; besides few persons, at this day, would care to take stock in a manufacturing or any similar company, with its statutory liability attached, as a substitute for tangible property.

The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application, as frequently to induce the belief that it must be universal, and be, in

all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text writers, confine the fiction to the purposes for which it was adopted — convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members; and have repudiated it in all cases where it has been insisted on as a protection to fraud or any other illegal transaction. Thus in *Brundred v. Rice*, 49 Ohio St. 640, where an incorporation had been formed for the purpose of giving effect to an illegal agreement between it and a railroad company for a discrimination in freights between it and other shippers, the fiction was disregarded, and a recovery allowed against the promoters by one who had been thus discriminated against, in like manner as if the corporation had no existence. See also the following citations: *Morawetz on Corporations*, sections 1 and 227; *Railway Co. v. Miller*, 51 N. W. 981; *Gas Company v. West*, 50 Iowa, 16; *Booth v. Bunce*, 33 N. Y. 139; *State ex. rel. Atty.-Gen. v. Standard Oil Co.*, 49 Ohio St. 137; *Bennett v. Minott*, 28 Oregon, 339, 348.

In *Montgomery Web Co. v. Dienelt*, 133 Pa. St. 585, which was a suit by a creditor of one company to set aside a conveyance by it to another, as in fraud of his rights, it appeared that the latter was formed substantially by the stockholders of the former, who relinquished their stock in it for stock in the latter; this being substantially all the consideration given by the purchasing company. This was held to be a fraud on the creditors of the former company, called the Aronia. The case does not differ in principle from the one before us. Here the conveyance was by an individual, and in consideration of stock taken in the corporation formed. The judge, delivering the opinion, said: "Is the Montgomery Company so completely a new and different company from the Aronia Company that the law must close its eyes to the fact that the difference is a mere jungle of names? We do not think there is any compulsion to such legal blindness. Settled general principles, and the analogies of the law, are against such a contention. If the corporation had merely changed its name, there could have been no doubt of the continued liability of the property." As to the creditors of the old company who had taken stock for their claims in the new one, they were held bound to know the nature of the transaction, and that the property conveyed could be followed by the creditors of the old company for the satisfaction of their claims.

*Judgment reversed.*

BRUNDRED v. RICE.

1892. 49 Ohio State, 640.

ERROR to Circuit Court.

Rice sued Brundred for money claimed to have been unlawfully exacted of him by the Cleveland and Marietta R. R. Co., as freight, on crude petroleum. The action was treated by both sides as an action of assumpsit for money had and received. It appeared that there was an agreement entered into between the R. R. Co. and Brundred *et als.*, that the R. R. Co. should charge all shippers of oil a certain rate, and should pay over to Brundred *et als.* (who were themselves shippers of oil) one half the freight so charged and collected. It also appeared that, soon after the making of the above agreement, a corporation styled the Ohio Transit Co. was organized under the laws of Ohio; and became, by assignment, a party to the above agreement, nominally acquiring all the rights of Brundred *et als.* thereunder.

Rice contended that Brundred *et als.* were the promoters of the Ohio Transit Co., caused it to be organized, and became and have always been its principal stockholders and its managing officers; and that they caused the Ohio Transit Co. to become a party (by assignment) to the above agreement for the purpose of carrying out their unlawful designs, and made use of said Transit Co., through their control of the same as its officers, to accomplish their unlawful purposes.

The defendants in their answer, among other things, set up that the Ohio Transit Company was a corporation duly organized under the laws of Ohio, and that they could not be charged with moneys received by it, on the ground set forth in the petition. But the court charged the jury that, "if you find by the greater weight of the evidence, that the assignment of the contract was a mere form; that the intention of the defendants in organizing this corporation was to make it a mere agency to receive this money, to be distributed to them under the contract, and according to their right in it as if there had been no assignment; the mere agent, I say, to hold the money for their benefit, why then, a payment to the corporation, under those circumstances, is a payment to them; and the plaintiff would have a right to recover as if it had been put in their hands."

Rice recovered \$1,823.75. The judgment was affirmed by the Circuit Court. Brundred *et als.* brought error.

*Nye & Oldham*, for plaintiffs in error.

*A. D. Follett*, *W. B. Loomis*, and *E. B. Kinkead*, for defendant in error.

BY THE COURT. [After deciding that the agreement between the R. R. Co. and Brundred *et als.* was against public policy; and that the shipper, on discovering the facts, might maintain an action against the party to whom the money had been paid over by the R. R. Co.]



It is claimed that the interposition of The Ohio Transit Company, an incorporation under the laws of Ohio, organized for the purpose of transporting petroleum through tubing and pipes, precludes a recovery against the defendants. If it had, in good faith, been organized for such purpose, there is no doubt but that the receipt of the money by it under the agreement, would constitute a defense to the action against the defendants. If, however, it was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense. The court fairly submitted this question to the jury, and in finding their verdict for the plaintiff, must have found the facts to be as averred in the petition. It is a stern but just maxim of the law, that fraud vitiates everything into which it enters. Deeds and records made in the most solemn form are set aside and held for naught when shown to have been effectuated for the purpose of fraud; and there is nothing so sacred in a certificate of incorporation as to take it out of the reach of this maxim.

*Judgment affirmed.*

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20 MILL v. HAWKER.

1874. L. R. 9 Exch. 309.

**DECLARATION.** Trespass by taking locks off the plaintiff's gates. Plea: not guilty by statute. Issue.

Plaintiff is the occupier of land, through which there runs a path, across which the plaintiff placed gates which he locked. At a meeting of the highway board for the district within which the path is situated, the board took the position that the path was a public highway; and also passed a resolution directing their surveyor to remove the obstruction, which he did.

The plaintiff brought this action against all the members of the board, who had concurred in the resolution and against Wickett, the surveyor.

At the trial no evidence that the *locus in quo* was a highway was given.

KELLY, C. B., ruled that the members of the board who had concurred in the resolution were not liable individually, and that Wickett was not liable. A nonsuit was ordered.

A rule was obtained to set aside the nonsuit and for a new trial.

Kingdon, Q. C., and Pinder (Lopes, Q. C., with them), showed cause.

Arthur Charles (H. T. Cole, Q. C., with him), in support of the rule.

*Cur. adv. vult.*

CLEASBY, B. The judgment I am about to read is that of my Brother Pigott and myself.

[The learned Judge *held*, that the surveyor, Wickett, was liable.]

As regards the other defendants who came to the resolution in pursuance of which the illegal act was done, a question of some difficulty arises. It is said that the resolution, having been afterwards embodied in the order signed by the clerk, became a corporate act of the highway board, and that no personal liability of the members could arise upon it. We were referred to many authorities to shew that in respect of corporate acts the individual members of the corporation cannot be sued: see *Attorney General v. Mayor of Liverpool*; <sup>1</sup> *Attorney General v. Bailiffs of Retford*.<sup>2</sup> There is, indeed, an express provision to this effect as regards the members of the highway board — but it is expressly limited to lawful acts of the board — in s. 9, subs. 6, of the Highway Act, 25 & 26 Vict. c. 61. And it is clear that this is so when the corporate acts are such as the corporate body is qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter. But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them, are acting ultra vires, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that in such a case the individuals and not the corporation really do the act, and no authority is needed for that conclusion. And in this case, unless the letter of the 30th November prevents it from being the act of the individual, it certainly was so in point of fact, for the defendant Wickett swears, in answer to the interrogatories, that he removed the locks by the direction of the highway board given at the meeting, that is, of the 29th of November. The cases of *Taylor v. Dulwich Hospital*,<sup>3</sup> and *Reg. v. Watson*,<sup>4</sup> may, however, be referred to in support of the proposition that the individuals really do the act; and in the case of *Poulton v. London & South Western Ry. Co.*, and particularly in the judgment of Blackburn, J.,<sup>5</sup> the difference is clearly pointed out between acts which are properly corporate acts and acts which are not, as affecting the liability of the corporation.

The question in the present case, therefore, is, whether the act of causing the locks to be removed is one of those acts for which the corporate body is constituted or not. It appears to us that it is not one of those acts.

The effect of holding that such a body as the highway board were competent in their corporate capacity to commit such an act of trespass as the one complained of in this case, would be that, whenever the trespass was illegal and redress was had, the persons who had really caused the trespass would not be responsible, and the damage

U.V. acts make individuals liable.

Corps does not do act

This was a U.V. act

Arg. & Conseq<sup>ts</sup> of whole of board not individually responsible

<sup>1</sup> 1 My. & Cr. 171.

<sup>2</sup> 3 My. & Cr. 484.

<sup>3</sup> 1 P. Wms. 655.

<sup>4</sup> 2 T. R. 199.

<sup>5</sup> Law Rep. 2 Q. B. at p. 538.

be paid out of funds which ought to be applied in maintaining the roads, and the persons eventually responsible would be the ratepayers, and among them, perhaps, the persons entitled to redress, and to whom the damages were to be paid. And thus the members of the highway board would acquire a power to divert and waste the funds intrusted to them for public purposes by proceedings which might originate in feelings which it would be most inconvenient to inquire into.

KELLY, C. B.

Two questions arise upon this case. The first is, whether this action is maintainable, not against the highway board in their corporate character, but against the individual members of the board who were present at the meeting, and one of whom moved and another seconded the resolution; and I am of opinion that it is not. The making of the resolution was a corporate act done at a corporate meeting convened and held in strict conformity to the Act of Parliament. No one member of the board assumed to exercise or did exercise any personal authority or power. The resolution was the act of the corporation and consisted of the minute made at the meeting according to the Act of Parliament, signed by the chairman, and by the statute receivable in evidence without further proof. I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is ultra vires, and is not, and cannot be in contemplation of law, a corporate act at all.

Kelly new. No  
act is ultra vires  
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act. corp. & ultra vires

In *Harman v. Tappenden*<sup>1</sup> the Free Fishermen of Faversham, a corporate body, at a corporate meeting made an order of amotion or disfranchisement against the plaintiff, a free fisherman and a member of the corporation, upon which the plaintiff brought his action for damages against the six individual corporators who had made the order, and it was objected "That no action would lie to recover damages against individuals for acts done in their corporate capacity, and that non constat, but that all or some of the defendants might have voted against the order of amotion." When the case came before the Court upon a motion to enter a nonsuit and in arrest of judgment, the Court intimated very strong doubts on this ground how far the defendants were answerable in damages in their private character for acts done by them in their corporate capacity. And Lord Kenyon, C. J., said that he entertained considerable doubt, notwithstanding what was said in *Rich v. Pilkington*,<sup>2</sup> and *Rex v. Mayor of Rippon*,<sup>3</sup> and added, "that he had many years ago moved for a mandamus to the master and fellows of Wadham College to compel them to put the college seal to a return which they were required to make, and to which Mr.

<sup>1</sup> 1 East, 555.

<sup>2</sup> Carth. 171.

<sup>3</sup> 1 Ld. Raym. 563.

Windham, the master, had great objection with respect to the facts agreed upon by a majority to be returned, conceiving that he should thereby make himself individually liable to the consequences, but Lord Mansfield overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character." Lawrence, J., expressed the same doubt, and, finally, upon cause being shewn, the Court held that without proof of malice the action was not maintainable, and the rule was discharged: see also 1 Ventris, 351, and *Rex v. Windham*,<sup>1</sup> the case alluded to by Lord Kenyon. It is true that where individuals make a pretended corporate act a cloak for a malicious libel or a libel on the administration of justice, the Court will grant a criminal information as in *Rex v. Watson*.<sup>2</sup> But an individual corporator is no more liable for a tort committed in his corporate capacity than for a debt due by the corporation. In either case I am of opinion that the action must be brought against the corporation in its corporate character and not against an individual member, who, like Mr. Windham in the *Wadham College Case*, may have been opposed to the act in respect of which the action may be brought. It was, indeed, once imagined, though on very technical grounds, that trespass would not lie against a corporation, and it is so stated in Comyns' Digest, Franchises, F. (19.). But, besides that many authorities are to be found in the year books to the contrary, the law is now well settled that upon any tortious act committed by a corporation, or under its authority, or by its direction, trover or trespass is maintainable.

} Corp can (held) Tort

I cannot doubt, therefore, that this action ought to have been brought against the board, and all these decisions are uniform to shew that it would have been maintainable. The mischief and inconvenience that would result if the contrary were held to be law is great and obvious. If judgment be recovered against these defendants execution might issue for the whole amount of damages and costs against any one among them, and he would have no remedy for contribution against the rest, nor as it should seem, upon the facts of the case, for indemnity against the corporation. And it is at least doubtful whether the board would have a legal right to indemnify him out of the funds which come to their hands under the Act of Parliament. On the other hand, if the action had been brought against the board, and judgment obtained against them, they may pay the damages and costs out of the funds which they are enabled to provide for the various purposes of the Act by ss. 20-27, and others.

Arg ab incogn

It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were ultra vires. But I apprehend that this is a misapplication of the term ultra vires. If the board, by resolution or otherwise, had accepted a bill of exchange directing their clerk or other officer to write their corporate

Action U.V.

<sup>1</sup> 1 Cowp. 377.

<sup>2</sup> 2 T. R. 199.

name or title across a bill drawn upon them for a debt, this would have been *ultra vires*, and no holder of the acceptance could have recovered the amount against them. It would have been void upon the face of it, and it is immaterial to consider whether the individuals who had written or authorized the acceptance would have been liable to any, and, if any, to what action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorized, as a trespass or the conversion of a chattel. If such an act is to be deemed *ultra vires*, and therefore no action would lie against the corporate body by whom it had been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorized by them, and the decisions above cited would be contrary to law. Two cases have, however, been cited which seem to bear upon the question against the defendants. But the first, *Poulton v. London and South Western Ry. Co.*,<sup>1</sup> merely shews that there is no implied authority by a railway company to their servants to do an illegal act. Here no question arises upon an implied authority, for this board have expressly authorized and commanded the surveyor to do the act complained of. On the other hand, in the Dulwich College case, *Taylor v. Dulwich Hospital*,<sup>2</sup> the constitution of the college requiring that leases granted should be at a rack rent, the contract for a lease not at a rack rent was *ultra vires* and not binding on the corporate body, and so if the plaintiff had been entitled to the relief prayed, it would have been granted against the individuals who had executed an instrument in the form of a corporate act, but which, being *ultra vires*, was absolutely void.

[The learned Judge *held*, that the surveyor was not liable.]

*Rule absolute.*

[The defendants appealed to the Exchequer Chamber from the above judgment rendered by the Court of Exchequer. The judges in the Exchequer Chamber were all of opinion that the surveyor was liable; and that, as far as regards the surveyor, the nonsuit at the trial was wrong. And they held, that, inasmuch as it was one nonsuit, where the parties were sued together in a single action, the decision that the nonsuit was improper as regards one, sets it aside as regards all, and that consequently the judgment of the Court of Exchequer, making absolute the rule for a new trial, must be affirmed. L. R. 10 Exch. 92. As to the liability of the members of the board, no decision was given. Upon that branch of the case, some of the learned judges expressed themselves as follows:]

BLACKBURN, J. Now, with regard to the other question which has been raised and discussed, as to whether the corporators were liable, it is one of considerable importance and great difficulty. If it were necessary to decide that question, we should require time for consideration, and possibly, when we had considered it, our decision would not be unanimous. Our decision would be of no assistance in sending the

<sup>1</sup> Law Rep. 2 Q. B. 534.

<sup>2</sup> 1 P. Wms. 655.

*Can an act assumed to be in form being the act of the  
treated as the act of Corp*

case down to trial, and would perhaps be an embarrassment to the learned judge who may have to try it. We think it better, therefore, to leave the decision of the Court of Exchequer upon that point as it is. We leave it with the authority it had before, no better and no worse. On the new trial the facts will be ascertained, and the point reserved in such a manner that the Court before which it comes will be much better able to deal with it than they would be if they were to consider it now. (L. R. 10 Exch. pp. 94, 55.)

DENMAN, J. With regard to the question as to the corporators being personally responsible, I think that is a matter of great difficulty, and that it would be better not to send down the case with a divided opinion, or, by taking time to consider, to prevent the case from being tried at the next assizes. (L. R. 10 Exch. pp. 98, 99.)

ARCHIBALD, J. I entirely agree as to the inexpediency of taking time to consider the question as to the personal liability of the corporators, as to which there may probably be some difference of opinion. (L. R. 10 Exch. pp. 99.)

✓ PARKER ET AL. v BETHEL HOTEL CO.

1896. 96 Tenn. 255.

*Of one man meeting (1911) (Ch 163) etc  
to 2 Feb 120. note 27209.144*

APPEAL from Chancery Court of Maury County.

On May 24, 1880, P. C. Bethel, W. D. Bethel, Lucius Frierson, Eugene Pillow, J. M. Mayes, and L. W. Black became incorporated, under the laws of the State of Tennessee, as the Bethel Hotel Company. The business of this corporation, as declared in its charter, was the erection, furnishing, and operation of a hotel in the town of Columbia, Tenn., the hotel building to include storehouses and a concert hall. The charter was taken out under chapter 142 of the acts of 1875, and was in the form prescribed for hotel companies, except that words were added authorizing it to build and own storehouses and a concert hall. The corporation was duly and regularly organized, with a capital stock of \$100,000, divided into shares of \$50 each. After its organization, the building contemplated by the charter was erected on a lot owned by the corporation. The building was used partly for a hotel, and partly for other purposes. Sept. 1, 1885, the Bethel Hotel Co. and Lucius Frierson conveyed to Mayes & Dodson the "hotel proper part" of the building, by deed signed "Bethel Hotel Company, W. D. Bethel, President; Lucius Frierson, Secretary and Treasurer; and Lucius Frierson." This conveyance was authorized by a vote of the stockholders at the last meeting ever held by them. No business seems to have been transacted by the corporation after this time. On or about Aug. 28, 1886, Frierson became the owner of all the stock of the company; but, both before and after that date, he pledged various shares as security for debts of his which are still outstanding. The stock so pledged was

*6 men erected  
as hotel*

*built hotel  
Co. & Frierson*

*Question  
+ general*

not transferred on the books of the company. He used the remainder of the building as his own up to Jan. 12, 1892, when he executed a deed in his own name, purporting to convey to Webster, in trust, the real estate owned by the Bethel Hotel Company and certain stock in that company. The purpose of this deed was to secure the payment of certain debts owing by Frierson, preferring one creditor and providing for *pro rata* payment of the others. Most of the creditors of Frierson who had loaned him money on the stock of the Bethel Hotel Co. were not provided for in the deed of trust. Parker *et als.*, creditors of Frierson and pledgees of said stock, filed a bill in equity, praying (*inter alia*) to annul the trust deed to Webster. The cause was heard before the Chancellor of Maury County, and afterwards before the Court of Chancery Appeals, from which the case was taken to the Supreme Court.

*G. T. Hughes, Fussell & Wilkes, W. S. Fleming, Jr., Granberry, & Marks, and John T. Williamson, for Parker.*

*Figuers & Padgett, E. H. Hatcher, and W. J. Webster, for Hotel Co.*

J. C. BRADFORD, Sp. J. [After fully stating the facts and pleadings.] It may be regarded as settled, therefore, that the legal title to the property conveyed to defendant, Webster, was, at the date of that instrument, in the Bethel Hotel Company, where it had been, unquestioned and undisturbed, since 1880, the year of its incorporation and organization. Defendants insist that, although Frierson may not have been invested with the legal title, he, nevertheless, had such an equitable estate and interest as entitled him to sell and dispose of the property. In other words, that he was the real owner of the property, and, as such, had the absolute right to use or dispose of it.

This alleged equitable estate was not the creation of any deed or written contract, executed by the Bethel Hotel Company, or of any corporate act or resolution adopted by the stockholders or directors, which in terms referred to or defined it, but is rather the result and consequence of certain facts and conditions, the existence of which is affirmed by the defendants.

It is said that the Bethel Hotel Company, by the alienation of that part of its property built for and adapted to the uses and purposes of a hotel, deprived itself of the means of conducting a hotel business, and that, since 1885, the date of the sale to Mayes & Dodson, it had ceased to exercise its corporate franchises; that the stockholders, at the meeting held in September, 1885, passed a resolution, or agreed among themselves, that the corporation should go into liquidation, and that Lucius Frierson, being then the owner of all the capital stock of the corporation, became, in consequence, the equitable owner of all its property, with full power to use it or dispose of it in such manner as he might choose to do. The position of the defendants seems to be that all rights of the corporation in the property were extinguished, that it had ceased to be affected with any corporate uses, and that it belonged absolutely to Frierson.

The facts affirmed by defendants are not all of them exactly as found by the Court of Chancery Appeals. It is true that the corpora-

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Result & condns

Non user by Co  
of its Charles  
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such user by  
sell. hotel part  
- Shih. Co.

tion sold and conveyed the hotel part of its building to Mayes & Dodson, retaining only the stores and opera house, and never afterwards engaged in the business of owning and operating a hotel. Lucius Frierson was not the sole stockholder in 1885, when the hotel was sold, and did not become such until August 28, 1886, when he purchased the Bethel stock. His stock, or a large part of it, at that time and subsequently, was held as collateral security by other parties. It is not true that a resolution was ever adopted by the stockholders directing the liquidation or winding up of the affairs of the corporation, or that they were ever wound up. The facts, as found by the Court of Chancery Appeals on this point, are stated in its opinion in the following words: "It may be fairly inferred, though it does not distinctly appear in terms in the proof, that when the deed was made to Mayes & Dodson it was then understood between W. D. Bethel and Lucius Frierson, they then owning practically all, or nearly all, of the stock, that Bethel should take the proceeds of the sale to Mayes & Dodson, amounting to \$22,500, and a sufficient amount, in addition, from Lucius Frierson, personally, to make \$30,000, and for this he would transfer his stock, \$61,000, to Frierson, and that this arrangement was consummated, so far as it could be done without direct corporate action of the corporation itself, by the paper of August 28, 1886, made by Bethel to Frierson, and this is what they understood by the resolution to go into liquidation, there being no debts due by the corporation, and, following out this idea, from the date of the sale to Mayes & Dodson, Lucius Frierson proceeded to treat the property as his own, on the idea that he himself constituted the corporation. We do not think that he entertained the idea that the corporation was defunct, but simply that he was, himself, the corporation, and could do what he wished with the assets."

In considering the position of the defendants, that Frierson became the equitable owner of the assets of the corporation, we must, therefore, leave out of view the idea that there was any corporate action looking to a dissolution of the corporation and winding up of its affairs. Frierson's estate or interest in the property, if he had any, rests on the postulate that, in consequence of the nonuser of its franchises and his sole proprietorship of all its capital stock, the corporation was dissolved, and he became the equitable owner of all its property.

A corporation can be dissolved, and its existence wholly terminated, only by the extinguishment of the corporate franchises conferred by the State. An ordinary business corporation, where its charter specifies no definite time for its continuance, may sell its property and wind up its affairs whenever a majority of the stockholders may deem it advisable (*Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; *Black v. Delaware & C. Canal Co.*, 22 N. J. Eq., 416); but the franchises conferred upon the stockholders by the State are not extinguished by the cessation from business thus brought about. 2 Morawetz on Corp., § 1004.

no corp  
dissoluti



It is claimed by the defendants that the dissolution of the corporation was effected by the fact that Lucius Frierson became the sole owner of all its capital stock. Admitting it to be true that he was the owner of all the stock of the corporation, it by no means follows that the corporation was thereby dissolved and forfeited its franchises. On this question the latest text writer on corporation law has this to say, viz.: "Contrary to early opinion, it is now generally held that the fact that all the shares in a joint stock company have passed into the hands of two members, or even into the hands of a single person, does not, *ipso facto*, work a dissolution of the corporation, since such sole owner may so dispose of the shares, as, by the election of the necessary directors and officers, to continue the corporate existence." 5 Thompson's Commentaries on the Law of Corporations, Sec. 6658. And, in 2 Morawetz on Corporations, Sec. 1009, it is said: "It is well settled that all the shares of a corporation may be held by a single person, and yet the corporation continue to exist, and, if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule." It has been held that a corporation which has sold all its assets, with the intention of putting an end to its business, whose officers had all resigned, and whose stockholders had all transferred their shares to a single person, was, nevertheless, not dissolved, and that its existence could be terminated only by judgment of forfeiture or by surrender accepted by the State. *Russell v. McLellan*, 14 Pick. (Mass.), 69, 70; *Newton Mfg. Co. v. White*, 42 Ga., 148; *Baldwin v. Canfield*, 26 Minn., 48.

The dissolution of a pecuniary or business corporation is effected in one of the following ways, viz.: (1) by the expiration of its charter; (2) by Act of the Legislature, where power is reserved for that purpose, or there is no constitutional inhibition; (3) by surrender of charter which is accepted; (4) by forfeiture of the franchises and judgment of dissolution pronounced by a Court having jurisdiction. 2 Morawetz, Sec. 1004; Taylor on Private Corporations, Sec. 430. It is not pretended that the Bethel Hotel Company was dissolved in either of the ways indicated. The charter of the corporation has not expired, neither has it been repealed by the Legislature, or been surrendered to the State by its members or stockholders. It may be true that there was a nonuser of its franchises by the corporation for a period of seven years or more, occasioned by the sale of the only property it owned which could have been used for hotel purposes. Undoubtedly the nonuser of its franchises by a corporation is ground for dissolution and forfeiture of its charter, at the instance of the State; but until sentence of dissolution has been pronounced by a Court of competent jurisdiction, in a proper proceeding instituted for the purpose, the corporation will continue to exist, notwithstanding its failure to use its franchises. And forfeiture can only be decreed in a proceeding directly instituted for the purpose, by the State granting it. Code (M. & V.) § 1712; *State v. Butler*, 15 Lea, 104, 110; *Jersey*

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*City Gaslight Co. v. Consumers' Gas Co.*, 40 N. J. Eq., 427; *Broadwell v. Merritt*, 87 Mo. 95. Until dissolution has been thus judicially pronounced, neither the existence of the corporation or its title to its property can be questioned collaterally.

We are bound to conclude, therefore, that the Bethel Hotel Company was not dissolved, or its franchises extinguished for any of the reasons alleged by the defendants, and that it is now a corporation endued with life, with authority to own property and exercise all the powers conferred on it by its charter.

Defendants insist that the alleged equitable estate of Lucius Frier-son in the property of the Bethel Hotel Company, did not depend alone upon the dissolution of the corporation, but resulted also from the fact that he was the sole owner of all its capital stock. The proposition is, that if one person owns all the shares of stock of a corporation which owes no debts, he, in virtue of such ownership, becomes the equitable owner of all its property, or, at least, may sell and dispose of it by deed, if he choose to do so. This proposition is argued by counsel for defendant with force and ability, and is supported by some authority. It has found favor with the Supreme Court of Maryland (*Swift v. Smith*, 65 Md., 428, 433); but the decision of that learned Court is opposed by the current of authority, and seems to us to overlook and ignore certain principles that are fundamental.

A corporation and its shareholders are distinct legal entities. In *Keith v. Clark*, 4 Lea, 718, this Court held that, notwithstanding the State owned all the stock in the Bank of Tennessee, "the bank and the State are entirely different legal entities," and, in *Lillard v. Porter*, 2 Head, 175, it was said, "stockholders are totally distinct from the corporation." Important consequences result from this rule. The shareholders are neither responsible for the debts nor for the torts of the corporation. In the absence of special circumstances, the shareholders cannot be parties, either plaintiffs or defendants, in actions respecting corporate rights, nor have they any title or direct interest in the property of the corporation.

"Shareholders," says Thompson, "are not joint tenants or in any other sense co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation." Commentaries on the Law of Corporations, Sec. 1071. As the shareholders have no direct interest in the corporate property, they cannot convey the real estate of the corporation, though all join in the deed.

In *Wheelock v. Moulton*, 15 Vt. 519, Redfield, J., stated the reasons for the rule in his usual clear and accurate style. In that case, Moulton and Hutchinson, sole proprietors and owners of all the stock of a corporation, conveyed its real estate, in mortgage, to secure the repay-

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ment of money borrowed of the plaintiff, Wheelock. He brought suit to enforce his mortgage. Judge Redfield said: "The fact that the signers of this deed owned the whole of the shares will make no difference in regard to the necessity of a vote of the corporation, in order to convey the land. The title to the land was in the corporation, not in the individual shareholders. The deed of one, or of any number of the stockholders, will not affect the title to the land. The share owners are not tenants in common of the land. They have no title whatever to any of the property of the corporation. It is true that one who owned all the shares might control the corporation, and so he could if he owned a majority of the shares; but he could, in either case, do it only by a vote of the corporation, at a meeting held in strict accordance with the statutes of the corporation."

And in *Humphreys v. McKissick*, 140 U. S. 304, Mr. Justice Field, discussing the same question, said: "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it, and the corporation acts only through its officers, subject to the conditions prescribed by law."

A very instructive case on this question is *Baldwin v. Canfield*, 26 Minn., 43. The facts of that case were very similar to those of this case, and the direct question now under consideration was passed upon. The opinion of the court was in accord with the cases above cited. See also *Button v. Hoffman*, 61 Wis., 20.

We are thus led, both by reason and authority, to the conclusion that Lucius Frierson, as sole stockholder of the Bethel Hotel Company, had no title, legal or equitable, to its property. The title to the property was in the Bethel Hotel Company, and could only be conveyed by it. The conveyance of its real estate is one of the most solemn acts of a corporation, and it can only be done in pursuance of a vote of the corporation, and by deed executed in the form and mode prescribed by law. Thompson's Commentaries on the Law of Corporations, Sec. 5096. At common law a corporation could not execute a deed to realty except under seal; and the general corporations Act of 1875, under which the Bethel Hotel Company was organized, provides that, if the corporation have no seal, it shall be bound by the signature of its name by a duly authorized officer.

To have made a valid conveyance of the real estate of the company, it was necessary, therefore, that the deed should have been executed in the name of the corporation, under seal, if it had one, and, if not, its name should have been signed by an agent duly authorized by its governing agency, its board of directors. *Garrett v. Belmont Land Co.*, 94 Tenn., 460. As we have seen, nothing of this kind was done. The deed to defendant, Webster, was executed by Lucius Frierson, in his own name and under his own signature. The Bethel Hotel Company, although it owned the property, was in no sense a party to it.

For this and other reasons given, the deed of Lucius Frierson, conveying the real estate of the Bethel Hotel Company to defendant, W. J. Webster, was void, and conveyed to him no title or interest therein.

We have assumed as a fact, in the preceding discussion, that Lucius Frierson was, in truth, the sole owner of all the shares of stock of the Bethel Hotel Company at the date he executed the deed to Webster. But was he?

[The court then *held* that the pledgees of the stock acquired title thereto, even though they took with notice of a by-law of the company that no transfer should be effectual unless made on the books of the company.]

**2-BUTTON v. HOFFMAN.**

1884. 61 Wisconsin, 20.

APPEAL from the Circuit Court for Jackson County.

Replevin. The facts sufficiently appear from the opinion. The defendant appealed from a judgment in favor of the plaintiff.

*C. J. Ainsworth* and *S. U. Pinney*, for appellant.

*Carl C. Pope*, for respondent.

ORTON, J. This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer.

In his instructions to the jury the learned judge of the Circuit Court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or indeed of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real though artificial person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are

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those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity. Ang. & A. Corp. §§ 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. Ang. & A. Corp. § 557. The corporation is the trustee for the management of the property, and the stockholders are the mere *cestui que trusts*. *Gray v. Portland Bank*, 3 Mass. 365; *Eidman v. Bowman*, 58 Ills. 444; s. c. 11 Am. Rep. 90; 4 Am. Corp. Cas. 350. The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. Ang. & A. Corp. § 191; *Pope v. Brandon*, 2 Stew. (Ala.) 401; *Whitwell v. Warner*, 20 Vt. 444. The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. *Bradley v. Holdsworth*, 3 M. & W. 422; *Waltham Bank v. Waltham*, 10 Met. 334; *Tippets v. Walker*, 4 Mass. 595. The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no legal right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. Ang. & A. Corp. §§ 160, 190, 557; *Hyatt v. Allen*, 56 N. Y. 553; s. c. 15 Am. Rep. 449; 4 Am. Corp. Cas. 624. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. *Wilde v. Jenkins*, 4 Paige, 481. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs is the inception of any title of a stockholder to it, although he be the sole stockholder. Ang. & A. Corp. § 779a.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint-owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the

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corporation, terminate the business and defraud its creditors. The stockholders would be the owners of the property, and at the same time it would belong to the corporation. One stockholder owning the whole capital stock could of course do what several stockholders could lawfully do. It is said in *Utica v. Churchill*, 33 N. Y. 161, "the interest of a stockholder is of a collateral nature, and is not the interest of an owner;" and in *Hyatt v. Allen*, *supra*, that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In *Winona, &c. R. Co. v. St. P., &c. R. Co.*, 23 Minn. 359, it is 'held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interest in its rights, property and immunities. In *Baldwin v. Canfield*, 26 Minn. 43, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In *Bartlett v. Brickett*, 14 Allen, 62, an action of replevin was brought by A., B. and C., as the "Trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A., B. and C., trustees as aforesaid," became bound, and the officer in his return, certified that he had taken a bond "from the within-named A., B. and C.," and the property was receipted by "A., B. and C., plaintiffs." It was held that the action was not by the corporation, as it should have been, and judgment was rendered for the defendant. It is said in *Van Allen v. Assessors*, 3 Wall. 584, "the corporation is the legal owner of all the property of the bank, both real and personal." In *Wilde v. Jenkins*, *supra*, where a copartnership bought all the property and effects, together with the franchises of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In *Mickles v. R. C. Bank*, 11 Paige, 118, it was held that although a corporation was deemed to have surrendered its charter for non-user, it was not dissolved, and would not be until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In *Bennett v. Am. Art Union*, 5 Sandf. 614, it was held that "as a general rule, the whole title, legal and equitable (to its property), is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of the complainant as a shareholder in the Art Union, for an injunction against a certain disposition of its property was denied, because he had no interest in it. See also *Goodwin v. Hardy*, 57 Me. 143.

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of its property. He may have an

equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. *Timp v. Dockham*, 32 Wis. 146; *Sensenbrenner v. Mathews*, 48 Wis. 250; s. c. 33 Am. Rep. 809. In analogy to the above principle it was held in *Murphy v. Hanrahan*, 50 Wis. 485, that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would entitle them to sue the maker upon it, because the title to it was in the administrator, and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy. The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

By THE COURT. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

*Reversed and remanded.*

### FAIRFIELD COUNTY TURNPIKE CO. v. THORP.

1839. 13 Conn. 173.<sup>1</sup>

ASSUMPSIT on stock subscription. Defendant offered to prove an admission made by one Hickok, a stockholder in the plaintiff corporation. The evidence was excluded. Verdict for plaintiff. Motion for a new trial.

*Dutton*, for defendant.

*Bissell and Booth*, for plaintiff.

WILLIAMS, C. J. . . . It is claimed, that *Hickok* being a stockholder in the company, his declarations are admissible as the confessions of a party. That the confessions of the party on the record may be given in evidence, is certainly true. Testimony of this kind proceeds upon the ground that it is not to be presumed that persons will admit anything against their interests. There are cases, however, where the party on the record has really no interest, or at most a mere nominal interest; as where a person has assigned a note without recourse; where a partnership is dissolved, and one is to discharge the debts, &c.; in which cases, this evidence is admitted, but with reluctance. In New-York it has been held, that the admissions of partners after a dissolution, cannot be given in evidence against a co-partner, except to prevent the operation of the statute of limitations. *Hopkins v. Bank*, 7 Cow. 650, 653; *Gleason & al. v. Clark*, admr. 9 Cow. 57; *Hackley v. Patrick & al.* 3 Johns. Rep. 536. We have adhered to the English rule in admitting the evidence, although in certain cases holding that it was entitled to no weight. *Coit v. Tracy*, 9 Conn. Rep. 1, 8 Conn. Rep. 268, 277. It becomes important to inquire, in this case, whether

<sup>1</sup> Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to one point. — Ed.

*Hickok* is a party upon the record. If he is, then any single shareholder in a bank of any amount of capital is a party to any suit brought by the bank, and his declarations are admissible. Whatever may be said as to the shareholders in corporations being parties in fact or parties in interest, it is certain they are not parties upon the record. The record speaks only of the artificial, intangible, being created by the act of incorporation. In corporations of this character, it speaks of and knows no individual. There are cases, however, in which courts have drawn aside the veil and looked at the character of the individual corporators; particularly when the question arises as to the jurisdiction of the court. This has been done by the supreme court of the United States the better to carry into effect the spirit of the constitution, giving the courts of the United States jurisdiction in suits between inhabitants. *Bank of the United States v. Deveaux*, 5 Cranch, 91, 2. But this is confined to the question of jurisdiction, and has never been extended further. *Bank of Augusta v. Earle*, 13 Pet. 586. So, too, this court has holden, that a judge shall not sit who is within the prohibited degrees of relationship to a member of a corporation; and this to carry into effect the spirit of the act and to prevent any suspicion of partiality. These cases, however, rather form exceptions to the rule than create a new one. We see nothing in the case before us which ought to induce the court to extend the rule of law beyond its letter. On the other hand, there are strong objections to this evidence. The first results from the nature of the evidence itself. For although the declarations of the party in interest against his interest, if fairly represented, are strong evidence against him; yet there is so much suspicion often attached to it from the misapprehension of the hearer and the treachery of memory in the reporter, to say nothing of the danger arising from a prejudiced mind, that it is often to be received with many grains of allowance. In cases of this kind the interest is frequently so minute as to create no presumption, or a very slight one, that the person would not make such a declaration because against his interest. On the contrary, many circumstances too minute for explanation, might lead to a bias much stronger than such pecuniary interest. Every day's experience will shew us that the prejudices and alienations which arise in the intercourse of business, entirely overpower the slight interest of small shareholders; and although this would be no reason for excluding evidence clearly admissible, yet it may be proper, in considering whether evidence excluded by the letter of the rule is within its spirit. Besides, the knowledge of individual stockholders is generally so limited as to make it of no importance.

It is said, however, that all these are proper considerations for the jury to weigh. But when we consider the surprise upon the real party from testimony of this kind from unexpected quarters, which must frequently happen, and the embarrassments occasioned thereby, the multitude of collateral inquiries which might often arise in investigating the real connexion of the persons whose admissions are offered in

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evidence, and the delay attending such inquiries, it seems to us that such evidence would more often mislead than guide to truth. It seems to be supposed, that because the individual stockholder cannot be compelled to testify, his declarations therefore are admissible; but it does not follow that the declarations of any person who cannot be compelled to testify on account of his interest are admissible as evidence. Take the case of bail, of a feme covert, of a person who, by his answer, might subject himself to a penalty or a debt; their declarations are not admissible as a matter of course. In such cases, perhaps a court of chancery, upon proper application, might compel a disclosure. Then there would be no surprise; and such terms might be imposed as would render it safe. We know that in England it has been decided by the court of *King's Bench*, that the admissions of a rated parishioner may be evidence in a suit by the inhabitants of the parish. It seems to have been thus first decided upon the ground that it was in fact a suit against the inhabitants themselves. *The King v. Inhabitants of Hardwick*, 11 East, 578, 586. There the suit is, in name as well as in fact, against the inhabitants; and the property of the individuals is liable to be taken in execution. *McLoud v. Selby*, 10 Conn. Rep. 395. And in a case but two years before, Lord *Ellenborough* held, that in an action by a corporation, what any individual said [referring to individual corporators] could not be given in evidence, although he did not extend the rule to the declarations of a public officer of the corporation. *The Mayor of London v. Long*, 1 Campb. 22. Before either of these cases, our superior court had decided that the declarations of an individual member of a corporation, even although he was an officer in it, could not be given in evidence. *Hartford Bank v. Hart*, 3 Day, 494. That decision has ever since been acquiesced in; and it is by the supreme court of New York favourably contrasted with the English decisions. *Osgood v. Manhattan Bank*, 3 Cowen, 623. And upon a careful review, we are not disposed to question the propriety of what has long been considered our settled practice. In the state of Maine, too, a similar decision has been made. *Polleys v. Ocean Insurance Company*, 2 Shep. 141.

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 of 58 Ark. 467 (Conn. 1904)

New trial not to be granted.

## PEOPLE v. NORTH RIVER SUGAR REFINING CO.

1890. 121 *New York*, 582.<sup>1</sup>

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the trial court, and affirmed an order denying a motion for a new trial.

This action was brought by the attorney-general to have the defendant "dissolved, its charter vacated and its corporate existence annulled."

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The complaint alleged, and it was found, that defendant is a corporation organized under the General Manufacturing Act; that it, together with other corporations engaged in the business of sugar refining, in violation of law and in abuse of its powers, became a party to and carried out a certain agreement. Some of the material features of this agreement are, in substance, as follows:

All the shares of the capital stock of all the corporations shall be transferred to a board consisting of eleven persons.

In lieu of the capital stock of each corporation, certificates not exceeding \$50,000,000 shall be issued by the board, and allotted in certain proportions to the respective corporations. 15 per cent of the certificates thus allotted to each corporation shall be left with the board; the remaining 85 per cent shall be divided among the former stockholders in proportion to the amount of stock formerly owned by each.

The board of eleven persons, holding all the stock of all the corporations, may transfer shares to persons whom it may desire should be constituted directors of such corporations.

The several corporations shall maintain their separate organizations, and each shall carry on and conduct its own business.

The profits arising from the business of each corporation shall be paid over by it to the board hereby created, and the aggregate of said profits, or such amount as may be designated for dividends, shall be proportionately distributed by said board, at such times as it may determine, to the holders of the certificates issued by said board for capital stock.

No action shall be taken by the board which shall create liability by it or by its members.

The certificates retained by the board (15 per cent of the entire issue) shall be subject to be disposed of by the board either for the acquisition of other refineries to become parties to this agreement, payment for additional capacity, or by appropriations to the several refineries.

The funds necessary to enable the board to make the payments herein provided to be made by it may be raised by mortgage to be made by

<sup>1</sup> Statement abridged. Arguments and portions of opinion omitted. — Ed.

the corporations, or either, any, or all of them, on their property, and by such other means as shall be satisfactory to such board.

Vacancies in the board by expiration of office shall be filled at an annual meeting of the holders of certificates, at which said holders shall vote according to the number of shares for which they hold certificates.

Other facts material to the decision are stated in the opinion.

*James C. Carter*, and *John E. Parsons*, for appellant.

*Charles F. Tabor*, Attorney General, and *Roger A. Pryor*, for respondent.

FINCH, J. The judgment sought against the defendant is one of corporate death. The State, which created, asks us to destroy; and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelops great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. That would be true even if the legislature should debate the destruction of the corporate life by a repeal of the corporate charter; but is beyond dispute where the State summons the offender before its judicial tribunals, and submits its complaint to their judgment and review. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks.

Two questions, therefore, open before us: first, has the defendant corporation exceeded or abused its powers, and, second, does that excess or abuse threaten or harm the public welfare.

The first question requires us to ascertain what the defendant corporation has done in violation of its duty, or omitted to do in performance of its duty. We find disclosed by the proof that it has become an integral part and constituent element of a combination which possesses over it an absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity. Into that combination, which drew into its control sixteen other corporations engaged in the refining of sugar, the defendant has gone, in some manner and by some process, for as an unquestionable truth we find it there. All its stock has been transferred to the central association of eleven individuals denominated a "Board;" in exchange it has taken and distributed to its own stockholders certificates of the board carrying a proportionate interest in what it describes as its capital stock; the new directors of the defendant corporation have been chosen by the board, made eligible by its gift of single shares, and liable to removal under the terms of their appointment at any moment of independent action. It has lost the power to make a dividend, and is compelled to pay over its net earnings to the master whose servant it has become. Under the orders of that master it has ceased to refine sugar, and by so much, has lessened the supply upon the

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market. It cannot stir unless the master approves, and yet is entitled to receive from the earnings of the other refineries, massed as profits in the treasury of the board, its proportionate share for division among its own stockholders holding the substituted certificates. In return for this advantage it has become liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for other and coveted refineries. No one can look these facts fairly in the face without being compelled to say that the defendant is in the combination and in to stay. Indeed, so much is with great frankness admitted on the part of the appellant. Its counsel concedes that the stock was transferred "to the board mentioned in the agreement and on the terms and for the purposes mentioned in the agreement; and that this action effectually lodged the control of the defendant company, so far as such control can be secured by the voting power, in that board."

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But that truth does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For, if it has done nothing, if what has happened, and all that has happened, is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellant stands, and which it submits to our examination.

*Did corp do this (appellant says no - sold to corp.)*

On the other hand it is contended that there never was a sale, but a trust constituted by mutual agreement; that they who agreed were the whole body of stockholders in each corporation necessarily representing and binding the corporation itself; that they transferred their shares to the board upon the trusts declared in the deed; that the certificates issued by the board were the formal declaration of the trust; that the corporate stockholders parted with the legal title of their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates; and so the corporations entered into a partnership with each other vesting the partnership power in a board of control.

*The hypothesis creates necessity for creation of trust by agreement of Board (the defendant) & stockholders*

I have brought these two theories face to face where they may confront each other, because, when a choice is made between them, we have gone a long distance towards the end of the controversy.

[The learned Judge held, that the transaction was not a sale, but a trust constituted by mutual agreement.]

*It argues that this trust was created by corp and is essential*

The combination, therefore, framed by the deed was a trust, and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argument which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own; are there without corporate action on their part; and so are sufferers and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure. Let us first recall the facts in the order of their occurrence.

[The learned Judge here recapitulated the facts; which were, in substance, that the stockholders unanimously directed the secretary to sign the agreement in behalf of the corporation; that he accordingly did so sign; that a subsequent vote to revoke this action was ineffective; that, at a later date, the stockholders voted to sell all the stock to John E. Searles, Jr., for \$325,000; that the stock was so conveyed to Searles; and that Searles thereafter conveyed all the stock to the board of eleven persons receiving therefor certificates for \$700,000, deducting the 15 per cent retained by the board. The opinion then proceeds:]

What Searles did with the certificates, we do not know, nor is it important to ascertain. We do know that new directors were chosen by the vote of the board; that Searles became President of the corporation; that its share of the regular dividend has been allotted to it for its certificate holders, and that it has wholly ceased to refine sugar. And thus its baptism in the pool of the board became complete and final.

And yet it is argued that the corporation, the legal entity, has done nothing; that Searles was guilty, but the corporate robe that enveloped him was innocent, and so he must be left to wear it undisturbed; that while all that was human and could act had sinned, yet the impalpable entity had not acted at all and must go free. I believe that the history of what occurred, as I have already described it, furnishes a sufficient answer, assuming that stockholders and trustees acting together can do a corporate act at all. There *was* corporate action in making the combination agreement which bound the defendant. The revocation of an executed authority left the contract standing. The corporation thus helped to make the trust and became an element of it. If there was anything imperfect in its action, the new stockholder and his associates waived the imperfection by acting upon the agreement of the corporation, and so confirming it in all particulars.

*It says that no corp acts here: trustees or directors did act formally as such.*

But the assumption underlying the view I have expressed is itself contested, and a proposition asserted which denies the possibility of any corporate action, except by the trustees or directors acting formally as such; a proposition which, if sound, dominates the whole field

of controversy, and, establishing that there has been no corporate action at all, effectually shuts out every question of illegality or public injury. I cannot admit that proposition. I think there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal and injurious may deserve and receive the penalty of dissolution. There always is, and there always must be, corporate conduct without formal corporate action where the thing challenged is an omission to act at all. A corporation organized in the public interest, with a view to the public welfare, and in the expectation of benefit to the community, which is the motive of the State's grant, may accept the franchise and hold it in sullen silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the State can put its finger and say, this the corporation has done by the agency through which it is authorized to act. That is corporate conduct which the State may question and punish without searching for a formal corporate act. The directors of a corporation, its authorized and active agency, may see the stockholders perverting its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, but silently acquiesce as directors in the wrong which as stockholders they have themselves helped to commit. That again is corporate conduct, though there be an utter absence of directors' resolutions. Is it asked what they could have done to prevent the organization of the trust; how they were negligent and unfaithful as corporate officers by their omission to act; what good a mere protest or objection would have accomplished; what effective form their resistance could have assumed? The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock-books; they could have said, and acted upon their words, that the original stockholders remained not only the beneficial, but the legal owners of the stock; and, if the board trustees appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career. So much they could have done as corporate officers; so much it was their duty to have done as representatives of the corporation; and when, beyond that corporate neglect, they recognized the validity of the stock transfers in trust, put the new and unlawful ownership upon their books, and accepted its votes in the choice of new directors who were to throttle the independence of the corporation and chain it to the will of the trust, I think we must shut our eyes in wilful blindness if we fail to see both corporate neglect and corporate action.

It is true, as we are reminded, that the statute confers upon trustees

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- That is the  
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- Answer.

and directors general authority to manage the stock, property, and concerns of manufacturing corporations; and equally true that, as a general rule and as between the companies and those with whom they deal, the corporate action must be manifested through and by the directors; but other statutes indicate with equal plainness that there are corporate acts which the trustees cannot perform, and which affect and bind the corporation only upon the condition that they proceed from the stockholders, or from them and the trustees acting together. In increasing or diminishing the capital stock, the corporate act is wholly that of the corporators, and in consolidating two or more companies into one, there must be the joint action of both trustees and stockholders. The trust of the refineries, in substance and effect, approached very near to these two corporate acts, so far as the resultant consequences affected the corporators acting. The trust stipulations practically doubled their corporate stock through the agency of the certificates issued, and the combination in its result is largely the equivalent of a substantial consolidation. If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that, would disarm the State in every case of misuse or abuse of chartered powers.

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The State gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hand, and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the State may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in

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*People ex rel. v. K. & M. T. R. Co.* (23 Wend. 193), "though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court."

? a + b on ab.

It remains to determine whether the conduct of the defendant in participating in the creation of the trust, and becoming an element of it, was illegal and tended to the public injury, and we may consider the two questions together and without formal separation.

II Was corp actn wrongful

It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the State the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. When it had passed into the hands of the trust, only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power, and so parted with the control which the charter gave them and the State required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends whatever may be its net earnings, and must encumber its property at the command of its master, and for purposes wholly foreign to its own corporate interests and duties. At the command of that master it has ceased to refine sugar, and without any doubt for the purpose of so far lessening the market supply as to prevent what is termed "over production." In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers, and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the State had a right to expect and require. It has helped to create an anomalous trust which is in substance and effect, a partnership of twenty separate corporations. The State permits in many ways an aggregation of capital, but mindful of the possible dangers to the people, over-balancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into a partnership. (*N. Y. & S. C. Co. v. F. Bank*, 7 Wend. 412; *Clearwater v. Meredith*, 1 Wall. 29; *Whittenton Mills v. Upton*, 10 Gray, 596.) The case last cited furnishes the reasons with precision and at length. It shows the utter inconsistency of a double allegiance by those who act for the corporation to two different principals, and demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. That the combination of the refineries partakes of the nature of a partnership is not denied.

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Indeed, in one of the papers added to the appellant's brief, it is not only admitted but asserted and defended. That paper shows quite clearly, that by force of the arrangement, there was a community of interest in the fund created by the corporate earnings before division, and that each member of the trust shared in the profit and loss of all. It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust or combination or partnership, however it may be described, amounts only to a practical consolidation which public policy does not forbid because the statute permits it. (Laws of 1867, chap. 960; Laws of 1884, chap. 367.) The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraints with which the State accompanied its permission. If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations and occupy the ground which otherwise would be left free. Under the statute the resultant combination would itself be a corporation deriving its existence from the State, owing duties and obligations to the State, and subject to the control and supervision of the State, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the statute the consolidated company taking the place of the separate corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed; and not as here a capital stock double that value at the outset and capable of an elastic and irresponsible increase. The difference is very great and serves further to indicate the inherent illegality of the trust combination.

And here I think we gain a definite view of the injurious tendencies developed by its organization and operation, and of the public interests which are menaced by its action. As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the State, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the State to respect the rights of ownership and

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protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and in strength and in their power over industry any possibilities of individual ownership; and the State by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing, what it should cause and create is quite another.

And so we have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this State there can be no partnerships of separate and independent corporations, whether directly, or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute.

The judgment appealed from should be affirmed with costs.

All concur.

*Judgment affirmed.*

## BOOK II.

### CORPORATE ACTION.

#### CHAPTER I.

##### FORMATION OF CORPORATIONS.

##### 55 FRANKLIN BRIDGE CO. v. WOOD.

1853. 14 *Georgia*, 80.

**ASSUMPSIT** in Heard Superior Court. Tried before Judge HILL, Term, 1853.

The Franklin Bridge Company was incorporated under the Act of the Legislature of 1843, to prescribe the mode of incorporating companies for certain purposes, by an order of the Inferior Court of Heard County,

The company sued the defendant, Wood, for his subscription to their stock.

The defendant pleaded that the company was not legally incorporated; contending that the act of the Legislature, referred to, was unconstitutional and void.

Upon argument, the court held that the act aforesaid was unconstitutional, and nonsuited the plaintiffs.

To this decision plaintiff excepted.

*Mabry*, for plaintiff in error.

*Featherston*, for defendant.

*By the Court*, LUMPKIN, J., delivering the opinion:—

Is the Act of 1843 and that of 1845, amendatory thereof, pointing out the manner of creating certain corporations and defining their rights, privileges, and liabilities, unconstitutional?

By the first section of the Act of 1843, it is provided "That when the persons interested shall desire to have any church, camp-ground, manufacturing company, trading company, ice company, fire company, theatre company, or hotel company, bridge company, and ferry company, incorporated, they shall petition in writing the Superior or Inferior Court of the county where such association may have been formed, or may desire to transact business for that purpose, setting forth the

object of their association, and the privilege they desire to exercise, together with the name and style by which they desire to be incorporated; and said court shall pass a rule or order, directing said petition to be entered of record on the minutes of said court."

Section 2 enacts "That when such rule or order is passed, and said petition is entered of record, the said companies or associations shall have power respectively, under and by the name designated in their petition, to have and use a common seal; to contract and be contracted with; to sue and be sued; to answer and be answered unto in any court of law or equity; to appoint such officers as they may deem necessary; and to make such rules and regulations as they may think proper for their own government; not contrary to the laws of this State; but shall make no contracts or purchase or hold any property of any kind, except such as may be absolutely necessary to carry into effect the object of their incorporation. Nothing herein contained shall be so construed as to confer banking or insurance privileges on any company or association herein enumerated; and the individual members of such manufacturing, trading, theatre, ice, and hotel companies, shall be bound for the punctual payment of all the contracts of said companies, as in case of partnership."

The third section declares that "No company or association shall be incorporated under this act, for a longer period than fourteen years; but the same may be renewed whenever necessary, according to the provisions of the first section of this act."

The fourth section confers upon the Superior and Inferior Courts respectively, the power to change the names of individuals.

Section fifth. "For entering any of said petitions and orders, and furnishing a certified copy thereof, the clerk shall be entitled to a fee of five dollars; except in cases of applications by individuals for the change of names,—in which case, the clerk of said court shall be entitled to the fee of one dollar. And that such certified copy shall be evidence of the matters therein stated in any court of law and equity in this State." Cobb's Digest, 542, 543.

By the Act of 1845 the provisions of the Act of 1843 are extended } to all associations and companies whatever, except banks and insurance } companies; and the individual members of all such incorporations are } made personally liable for all the contracts of said associations or } companies. Ibid.

The argument against the validity of the charter of the Franklin Bridge Company, created under these statutes, is this:—

1. That in England, corporations are created and exist by prescription, by Royal Charter, and by Act of Parliament. With us they are created by authority of the Legislature, *and not otherwise*. That to establish a corporation is to enact a law; and that no power but the legislative body can do this.

2. That legislative power is vested under our Constitution, in the General Assembly, to consist of a Senate and House of Representa-

tives, to be elected at stated periods by the citizens of the respective counties.

3. And that the General Assembly is bound to exercise the power of making laws thus conferred upon them by the people in the primordial compact, in the mode therein prescribed, and in none other; and that a law made in any other mode is unconstitutional and void. That the Legislature is but the agent of their constituents; and that they cannot transfer authority delegated to them to any other body, corporate or otherwise,—not even to the Judiciary, a co-ordinate department of the government, unless expressly empowered by the Constitution to do so. That to do this would be to violate one of the fundamental maxims of jurisprudence as well as of political science, namely, *delegata potestas non potest delegari*. That to do this would not only be to disregard the constitutional inhibition which is binding upon the representative, but by shifting responsibility introduce innovations upon our system, which would result in the overthrow and ultimate destruction of our political fabric.

The constitutional inquiry thus presented is an exceedingly grave one. It reaches far beyond the case made in the bill of exceptions, and extends to the whole range of topics which fall under legislative cognizance. In the view we take however of the statutes before us, no such proposition as that which has been discussed is presented for our adjudication. And we rejoice that it is so, not only on account of the delicacy of the task, in pronouncing an act of Legislature unconstitutional and void,—one which is never justifiable unless the case is clear and free from doubt; and even then one might almost be forgiven for shrinking from the performance of a duty which would be productive of such incalculable mischief and confusion. Bridges have been built at a heavy expense; manufacturing and innumerable other associations have been formed in Georgia, and are in full operation, under charters incorporated under this law. And in view of the consequences any court might hesitate, unless the repugnance between the statute and the Constitution was so palpable as to admit of no doubt, and produce a settled conviction of their incompatibility with each other.

4. It was formerly asserted that in England the act of incorporation must be the *immediate* act of the king himself, and that he could not grant a license to another to create a corporation. 10 Reports, 27. But Messrs. Angell and Ames, in their Treatise on Corporations, state that the law has since been settled to the contrary; and that the king may not only grant a license to a subject to erect a particular corporation, but give a general power by charter to erect corporations indefinitely, on the principle that *qui facit per alium facit per se*; that the persons to whom the power is delegated of establishing corporations, are only an instrument in the hands of the government. 1 Kyd, 50; 1 Black. Com.; Ang. & Am. 63.

Before the revolution, charters of incorporation were granted by the

proprietaries of Pennsylvania under a derivative authority from the Crown ; and those charters have since been recognized as valid. 3 Wilson's Lectures, 409. A similar power has been delegated by the Legislature of Pennsylvania with regard to churches. 7 S. & R. 517. The acts of the instrument in these cases become the acts of the mover, under the familiar maxim above mentioned. See also 1 Missouri R. 5.

5. Our opinion is that no legislative power is delegated to the courts by the acts under consideration. There is simply a ministerial act to be performed, — no discretion is given to the courts. The duty of passing the rule or order directing the petition of the corporators to be entered of record on the minutes of the court, setting forth to the public the object of the association and the privilege they desire to exercise, together with the name and style by which they are to be called and known, is made *obligatory* upon the courts ; and should they refuse to discharge it, a mandamus would lie to coerce them. It is true the Legislature has seen fit to use the courts for the purpose of giving legal form to these companies. But it might have been done in any other way. Under the Free Banking Law of 1838, instead of petitioning the court, and having the order passed and entered upon its minutes, the certificate specifying the name of the association, its place of doing business, the amount of its capital stock, the names and residence of the shareholders, and the time for which the company was organized, is required merely to be proven and acknowledged, and recorded in the office of the clerk of the Superior Court, where any office of the association is established, and a copy filed with the Comptroller General. Cobb's Digest, 107, 108.

And so under the Act of 1847, authorizing the citizens of this State, and such others as they may associate with them, to prosecute the business of manufacturing with corporate powers and privileges. The persons who propose to embark in that branch of business are required to draw up a declaration specifying the objects of their association and the particular branch of business they intend carrying on, together with the name by which they will be known as a corporation, and the amount of capital to be employed by them ; which declaration is required to be first recorded in the clerk's office of the Superior Court of the county where such corporation is located, and published once a week for two months in the two nearest Gazettes ; which being done, it is declared that said association shall become a body corporate and politic, and known as such, without being specially pleaded, in all courts of law and equity in this State, to be governed by the provisions and be subject to the liabilities therein specified. Cobb's Digest, 439, 440.

In these two instances, and others which might be cited, the Legislature have dispensed with the action of the courts, or of any other agency, to carry out their enactments with regard to these various associations which have become the usual and favorite mode of conducting the industrial pursuits of the civilized world in modern times.

All these Statutes were complete as laws when they came from the hands of the Legislature, and did not depend for their force and efficacy upon the action or will of any other power. It is true that they could only take effect upon the happening of some event, such as the filing the petition or declaration, and giving publicity to the purpose of the association in the mode prescribed by the act. But if this were a good reason for regarding these statutes as invalid, then how few corporations could abide the test! For it requires the acceptance of the charter to create a corporate body; for the government cannot compel persons to become an incorporated body without their consent. And this consent, either express or implied, is generally subsequent in point of time to the creation of the charter. And yet, no charter that we are aware of has been adjudged invalid, because the law creating it and previously defining its powers, rights, capacities, and liabilities, did not take effect until the acceptance of the corporate body, or at least a majority of them, was signified.

The result therefore of our deliberation upon this case is, that the Acts of 1843 and 1845, vesting in all associations, except for banking and insurance, the power of self-incorporation, do not impugn the Constitution, and that the charter of the Franklin Bridge Company and all others created under them, and in conformity to their provisions, are legal and valid. With the policy of these Statutes we have nothing to do. The province of this and all other courts is *jus dicere*, not, *jus dare*.

*Judgment reversed.*

No form of words is required in order to create a corporation. A grant of the power to perform corporate acts, implies a grant of corporate powers. . . .

LEWIS, J., in *Com. v. Westchester R. Co.*, 3 Grant's Cases, Pa. 200, p. 202.

. . . this word *incorporo*, or any derivative thereof, is not in law requisite to create a corporation; but other equivalent words are sufficient. . . .

. . . to the creation of an incorporation the law had not restrained itself to any prescript and incompatible words.

The Case of Sutton's Hospital, 10 Coke's Reports, 23, pp. 30 a, 30 b.

recognizes legal monopoly of creation of corp. of. Moran. Res. 79/59.60. (1889) notes of  
 A prop. operates a Ry needs rat to condemn land. argues only corp. can do this. Ind. b. can  
 if leg. delegates it properly. Reason why stat expressly gives this right to Corp. is that indiv. does not  
 need Stat. and it builds & operates Ry on the other hand. A corp. is a creature legal. It has to men  
 duties are conferred definitely Stat. No such stat. and it can exist on basis of any bus.  
 of abo. 1874/326.

## STATE v. DAWSON ET ALs.

1861. 16 *Indiana*, 40.APPEAL from the *Clark* Circuit Court.

PERKINS, J. Information against the defendants, charging that they are pretending to be a corporation, and to act as such, when they are not a corporation. It charges that in *January*, 1849, the Legislature of the State of *Indiana* enacted a special charter of incorporation, (which is set out at length,) for a railroad from *Fort Wayne, Indiana*, to *Jeffersonville*, to be called the *Fort Wayne and Southern Railroad*; that the persons named in the charter as directors did not accept said charter till *June 2*, 1852, when they did meet and accept the same, and organize under it. It is alleged that the defendants are assuming to act under said charter, never having organized under any other. The court below sustained a demurrer to the information; thus holding the defendants to be a legal corporation.

The present Constitution of *Indiana* took effect on *November 1*, 1851. It contains these provisions:—

“All laws now in force and not inconsistent with this Constitution, shall remain in force, until they shall expire or be repealed.” Sched. (1 sub. sec.) of Const.

“Corporations, other than banking, shall not be created by special act, but may be formed under general laws.” Art 11, § 13.

“All acts of incorporation for municipal purposes shall continue in force under this Constitution, until such time as the General Assembly shall, in its discretion, modify or repeal the same.” Sched. *supra*, sub. sec. 4.

The charter for the *Fort Wayne and Southern Railroad* was not a charter for municipal purposes, and, hence, was not specially continued in existence. Art. 11, § 13, above quoted, prohibits the creation of a corporation by special act or charter, that is, as we construe the prohibition, through, or by virtue of, such special act or charter, after *November 1*, 1851. The policy that induced the prohibition, as well as its literal import, demands this construction. It is necessary for us to ascertain, then, when the defendants, if ever, were created a corporation. The simple enactment of the charter for the corporation, by the Legislature, did not create the corporation. It required one act on the part of the persons named in the charter to do that, viz: acceptance of the charter enacted.

Says *Grant*, in his work on corporations, *vide* p. 13: “Nor can a charter be forced on any body of persons who do not choose to accept it.” And again, at page 18, he says, “The fundamental rule is this: no charter of incorporation is of any effect until it is accepted by a majority of the grantees, or persons who are to be the corporators under it. *Bagge's* case, 2 Brownl. & G. 100; S. C. 1 Roll. Rep. 224;



Dr. *Askew's* case, 4 Burr. 2200 ; • *Rutter v. Chapman*, 8 M. & W. 25 ; per *Wilmot, J., Rex v. Vice-Chancellor of Cambridge*, 3 Burr, 1661. This is analogous to the general rule that a man cannot be obliged to accept the grant or devise of an estate. *Townson v. Tickell*, 3 B. & Ald. 31." See, also, Ang. & Am. § 88, where it is said, if a charter is granted to those who did not apply for it, the grant is said to be *in fieri* till acceptance. We need not inquire whether this rule extends to municipal corporations in this country. As to what may constitute an acceptance we are not here called on to decide, as the information expressly shows that there was none in this case till June, 1852, which fact is admitted by the demurrer.

The grant of the charter in question, then, to those who had not applied for it, was but an offer, on the part of the State ; a consent that the persons named in the charter might become a corporation, might be created such an artificial being, by accepting the charter offered. But an offer, till accepted, may be withdrawn. In this case, the offer made by the State, in 1849, was withdrawn by the State, November 1, 1851, by then declaring that no corporation, after that date, should be created except pursuant to regulations which she, in future, through her Legislature would prescribe.

This pretended corporation, then, was not created before November 1, 1851 ; and it could be created afterward only by the concurrent consent of the State and the corporators. But, at that date, the Constitution prohibited both the State and corporators from giving consent to such a corporation, to wit : one coming into existence through a special charter ; and hence necessarily prohibited the creation thereof. This decision accords with that of the Supreme Court of the *United States* in *Aspinwall v. Daviess County*, 22 How., p. 364 ; where it was held that the new Constitution prohibited a subscription of stock to the *Ohio and Mississippi Railroad Company*, authorized by the charter of the corporation, granted under the former Constitution, and actually voted by the people of the county, under that Constitution.

Whether, as a matter of fact, the charter in this case was accepted under the old Constitution, must be determined on a trial of the cause below.

Had the provision in our Constitution, like that on this subject in the Constitution of *Ohio*, ordained that the Legislature should "pass no special act conferring corporate powers," the restraint would clearly have been imposed alone upon future legislative action ; but, in our Constitution, the restraint is plainly imposed upon the creation, the organization, of the corporation itself. See *The State v. Roosa*, 11 O. St. R. 16.

*Per Curiam.* The judgment is reversed, with costs. Cause remanded for further proceedings in accordance with this opinion.

*C. B. Smith, J. W. Gordon, and Watt J. Smith*, for the appellant.  
*R. Crawford*, for the appellees.

## 21 ELLIS v. MARSHALL.

1807. 2 Massachusetts, 269.<sup>1</sup>

**EJECTMENT.** The plaintiff claimed under a sale by the "*Front Street Corporation in the town of Boston*," established by a law of the Commonwealth, passed March 6, 1804.<sup>2</sup> By this statute sundry persons, and amongst them the defendant, *Marshall*, described as "being owners and proprietors of the lands and flats over which the said street will pass, and of the lands and flats adjoining thereto," are incorporated for the purpose of making a street in the town of *Boston*. By the third section of the statute, the corporation are authorised to assess upon all the owners and proprietors of said land and flats, according to the proportion they severally hold therein, such sums of money as shall be agreed upon by the said proprietors, or the major part of such of them as shall be assembled at any legal meeting to be called for that purpose; and if any of the said proprietors shall neglect or refuse to pay the sums of money duly assessed upon him therefor, for the space of three months, the proprietors are authorized to sell, at public auction, so much of such delinquents share of said lands and flats as shall be sufficient to pay the sums so assessed, and the charges of sale: and the said proprietors may, by their clerk or committee, execute a good deed to the purchaser in fee simple.

*Marshall* was not one of the petitioners for the act of incorporation; never assented to the petition; and never attended a meeting of the corporation.

It was agreed, "that, on the tenth day of October last, the land demanded in this action, being part of the said *Marshall's* estate adjoining said street, was sold at public auction, according to the rules and regulations of the Corporation, and the powers granted in said act, for the purpose of raising the amount of the assessment taxed on him by said Corporation, as being towards his proportionate part of the expence of making said street, which, though often requested, he had refused to pay, and a deed of conveyance thereof was accordingly given by said Corporation to said *Ellis*, to hold the premises demanded, to him in fee simple."

"If on the foregoing facts the court should be of opinion that the said Corporation could, by virtue of the said act, legally assess the said *Marshall*, and sell his lands for non-payment thereof, then it was agreed that the defendant should be defaulted, and judgment should be rendered for the plaintiff; otherwise the plaintiff was to become nonsuit, and judgment be rendered for the defendant."

*Parsons and Dexter*, for plaintiff.

*The Attorney General, Sullivan, and Amory*, for defendant.

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

<sup>2</sup> 2 Mass. Special Laws, 375.

PARKER, J. From the foregoing facts and the arguments thereon by the counsel, it appears that all the proceedings of the corporation relative to the assessment and sale were correct; so that if *Marshall* were, at the time thereof, a member of the corporation, the title to the demanded premises in *Ellis* could not be disputed.

We are therefore necessarily brought to the question, indeed the only one in the case, whether *Marshall*, by virtue of the act aforesaid, became a member of the said corporation, subject to its rules and regulations, and liable to be assessed for the purpose of building said street.

The counsel for the plaintiff have contended

1st. That by virtue of the act itself, *Marshall* being named therein, he became *ipso facto* a member of the corporation, the Legislature having competent power to compel him thereto:

2dly. That should this not be the case, the foregoing facts contain sufficient evidence of his consent, tacit at least, to the passing of said act, and the insertion of his name therein.

The determination of the first point requires that we should ascertain the true nature and character of this legislative proceeding. If it were a public act, predicated upon a view to the general good, the question would be more difficult. If it be a private act, obtained at the solicitation of individuals, for their private emolument, or for the improvement of their estates, it must be construed, as to its effect and operation, like a grant. We are all of opinion that this was a grant or charter to the individuals who prayed for it, and those who should associate with them; and all incorporations to make turnpikes, canals and bridges must be so considered.

Can then one, whose name is by mistake or misrepresentation inserted in such an act, refuse the privileges it confers, and avoid the burthens it imposes? If he cannot, then the Legislature may, at all times, press into the service of such corporations those whose lands may be wanted for such objects, whenever they may be prevailed on to insert the names of such persons, by the intrigue or mistake of those more interested in the success of the object. No apprehension exists in the community that the Legislature has such power. That the land of any person, over or through which a turnpike or canal may pass, may be taken for that purpose, if the Legislature deem it proper, is not doubted. The constitution gives power to do this, provided compensation is made. But it was never before known, that they have power over the person, to make him a member of a corporation, and subject him to taxation, *nolens volens*, for the promotion of a private enterprise.

That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear, to require the support of authorities. That he may decline to improve his land, no one will doubt. Although the Legislature may wisely determine that a certain use of his property will be highly beneficial to him, he has a right to

judge for himself on points of this nature. The fact therefore in the case, that *Marshall* is benefited equally with the other owners by the making of this street, is of no importance.

Upon the whole, therefore, we are of opinion that the act under which the plaintiff sets up his title, could not bind *Marshall* without his dissent: that he having uniformly, whenever opportunity occurred, signified his dissent, is not a member of the corporation it created, was not liable to their assessments, and therefore that the sale of his land was without authority of law and is void.

*Plaintiff nonsuit.*

## NEWCOMB v. REED.

1866. 12 Allen, 362.

CONTRACT, in which the plaintiff sought to charge the officers of the Boston Mechanical Bakery Company with a debt contracted in the name of the corporation, in consequence of their neglect to file certificates and statements of the condition of the corporation. At the trial in the superior court, before *Ames, J.*, without a jury, the judge found for the defendants upon facts which are stated in the opinion; and the plaintiff alleged exceptions.

*C. B. Goodrich & E. Avery*, for the plaintiff.

*E. Merwin*, for the defendants.

HOAR, J. The defence to this action rests wholly upon the assumption that the corporation, whose officers the plaintiff seeks to charge with a statute liability for its debts, never had a legal existence. The only defect suggested in the organization of the corporation is, that the call for the first meeting was signed by only one of the persons named in the act of incorporation, and not by a majority of them, as required by *St. 1855, c. 140*.

The case of *Uiley v. Union Tool Company*, 11 Gray, 139, is the authority on which the defendants chiefly rely. That case decided that in order to charge as stockholders of a manufacturing corporation persons who had been summoned in an action against it under *St. 1851, c. 315*, the plaintiff must prove the legal existence of the corporation. The alleged corporation had no charter or act of incorporation from the legislature, but was an association which had undertaken to assume corporate powers under a general act for the formation of joint stock companies, *St. 1851, c. 133*. That statute authorized three or more persons who had entered into "articles of agreement in writing" for the transaction of certain kinds of business, to organize in a manner prescribed, and thereby to become a corporation; and the court were of opinion that written articles of agreement were essential to constitute a corporation, and that these articles must fix the amount of the capital stock, and set forth distinctly the purpose for which and

the place in which the corporation was established. The court say, "There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted." And they add that "it is not a case of a defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being, which had the power of contracting debts or of rendering persons liable therefor as stockholders."

We think these reasons have no application to the case now before us. In this, there was an act of incorporation from the legislature. There is no question that the corporate powers which it conferred were assumed by the persons by whom it was intended that they should be enjoyed, so far as they chose to avail themselves of them. The organization was not strictly regular, but can hardly be considered even as defective.

And if the object of the statute is regarded, by which it is required that the first meeting shall be called by a majority of the persons named in the act of incorporation, it will be evident that it is directory merely, and only designed to secure the rights conferred by the charter to those to whom it was granted, among themselves, by providing an orderly method of organization. Thus, if all the persons interested should come together without any notice or call whatever, and proceed to accept the charter, and do the other acts necessary to constitute the corporation, we cannot doubt that their action would be valid, and that neither the public, nor any persons not belonging to the association, would have any interest to question their proceedings.

The purpose of the statute was probably to avoid such difficulties as were disclosed in the case of *Lechmere Bank v. Boynton*, 11 Cush. 369, where two parties had attempted to organize separately under the same charter, each claiming to be the corporation.

There is nothing in the facts found and reported to show that all persons interested were not actually notified of the meeting for organization. On the contrary, it would seem that they were. No one has questioned the regularity of the proceedings, or claimed, as in *Lechmere Bank v. Boynton*, a right to organize in a different manner. The evidence was ample to show that the persons named in the act of incorporation with their associates, or at least all of them who desired to do so, have accepted the act, organized under it, issued stock, elected officers who have acted and served in that capacity, carried on business, contracted debts, and exercised all the functions of corporate existence. It is therefore too late to deny that the corporation ever had any legal existence, or for these officers to avoid the liabilities which the statutes of the Commonwealth impose.

The defendant Brackett, who was treasurer in February 1861, appears to have been liable with the directors under the provisions of Gen. Sta. c. 60, §§ 18, 20, 31.

*Exceptions sustained.*

*Cite 2:13:2:17.*

## CHERAW & CHESTER R. CO. v. WHITE.

1880. 14 South Carolina, 51.<sup>1</sup>

WILLARD, C. J. This action was brought to recover the amount of a subscription to the capital stock of the plaintiff company, alleged to have been made by the defendant, and not duly complied with on his part. The defendant demurred to the complaint on various grounds. This demurrer was overruled by the Circuit Court, and leave to answer granted on terms. From this decision the defendant now appeals.

The first ground of demurrer is, that the plaintiff has no capacity to sue. Several propositions are stated under this ground of demurrer that, in substance, involve the general proposition that the plaintiffs have received, by law, only authority to become a corporation upon the performance of certain conditions precedent, and that the complaint contains no allegations showing that such conditions have been performed.

The act to charter the plaintiff company, passed February 27th, 1873, (15 Stat. 442,) confers corporate powers on the corporators named, in terms importing an immediate grant, with the following proviso annexed: "Provided that said persons shall commence operations upon said road within two years after the passage of this act, and complete the same within five years." The period of completion is stated by Section 6 at seven years, but this conflict of time is not material to the present question. The question is whether the proviso can have the effect to convert a grant of the corporate franchise, made in terms that import an immediate grant, into one taking effect only upon the happening of a certain contingency. If the purpose intended by the proviso cannot be fully accomplished without a limitation of the broad sense of the language conferring the franchise, then such effect can be accomplished consistently with the rules of construction, for, in that case, the proviso would be necessarily interpreted as a condition in substance and effect. As a condition subsequent this is undoubtedly the effect of the proviso, but does it contain, in itself, anything that imports a necessity that it should operate as a condition preced-

<sup>1</sup> Statement omitted. Only so much of opinion is given as relates to one point. — Ed.

dent? Two things are to be considered in this respect: *First*. What is essential to the full efficacy of the matter of the proviso itself? *Second*. What would be the effect of allowing it to stand as a condition precedent on the completeness of the powers granted for the purpose intended by the grant, and to which the terms of the proviso stand as a condition? It certainly was intended that the corporators should have all the powers and capacity properly incident to a railroad corporation for the purpose of enabling it to commence and complete the road in the times prescribed by the law, for it must be assumed that the construction of the road was deemed a public benefit, and that the acquisition of that benefit to the public was the true consideration of the grant, and, in this light, the proviso must be regarded as directly intended as a means of hastening its construction. This view also excludes the idea that the proviso was intended to limit the capacity or powers of the company to construct the road within the times prescribed for that purpose. It must certainly be assumed that the possession of corporate powers during the time that the company was organizing and acquiring the capital and credit requisite to construct the road was a material aid toward the accomplishment of that result. It is fair, then, to assume that the grant, in terms importing immediate corporate capacity, was intended to operate as such for the purpose of conferring on the corporation the most perfect means for accomplishing that which it was the purpose of the proviso to secure. So far then from its being essential to the efficacy of the proviso that the sense of the terms granting, directly, the corporate franchise should be narrowed, the purpose of the proviso is best subserved by holding these powers intact according to the terms in which they were granted. If, at the end of two years, the corporation had not commenced to construct the road, every object intended to be secured to the state and to the public, by the limitation, would be fully attained, even if the company had at once, upon the granting of the charter, become a corporation. The extinguishment of the franchise of building and operating a railroad would have followed, and the right to exercise the functions of a corporation would have fallen with it as an accessory. On the other hand if the grant is held to be subject to a condition precedent, by reason of the limitation as to commencing work in two years, the argument that would produce that result would go a step further and make the completion of the road a condition precedent. In that case the anomaly would be presented of a company undertaking the construction and completion of a work of such magnitude without the powers of a corporation, and only hoping to obtain such powers when the work had been accomplished. Such an intention cannot be ascribed to the statute. It is clear that the demurrer was properly overruled as it regards the ground just considered.

. . . . .

*Judgment affirmed.*

Ans. 12  
Const. v. Grant, P. 106 & Much 122

CHAPTER II.

POWERS OF A CORPORATION.

(A) *Determination of the Powers.*

DOWNING v. MOUNT WASHINGTON ROAD CO.

1860. 40 *New Hampshire*, 230.

**ASSUMPSIT**, brought by Lewis Downing & Sons, to recover the price of eight omnibuses, and a model for the same, one light wagon, and one baggage wagon, made for the defendants, under a contract entered into by D. O. Macomber, president of the defendant corporation, in their behalf.

The light wagon was made and sent to one Cavis, the agent for building the road, and was used by him in making it. The omnibuses and baggage wagon were intended to be used in conveying passengers up and down the mountain, after the road was completed. The omnibuses were constructed in a peculiar way, and are not fit for use on ordinary roads.

By their act of incorporation, passed July 1, 1853, the corporation was empowered to lay out, make and keep in repair, a road from such point in the vicinity of Mt. Washington as they may deem most favorable, to the top of said mountain, &c., and thence to some point on the northwesterly side of said mountain, &c., to take tolls of passengers and for carriages, to build and own toll-houses, and to take land for their road.

The corporation was duly organized, and at a meeting of the directors on the 31st of August, 1853, before said contract was made, it was "voted that the president be the legal agent and commissioner of the company;" and his compensation as such was fixed.

"The president" was "directed to proceed with the letting of the work for the construction of the road," "the obtaining the right of way," and "what other action he shall deem proper, for the interests of the company," &c.

A committee was appointed "to settle in relation to the right of way, &c., and in relation to land on which to build stables and other buildings, for the use of the road, and also for building all such stables and houses as may be necessary for the operations of the company."

U.S. aspects: res: Here C was fully perf'd on P's order yet no act allowed. (Held not)

Const Art 87, 8, 9.  
C. Code 854-326  
863-326



It appeared that by an additional act, passed July 12, 1856, the corporation were authorized "to erect and maintain, lease and dispose of any building or buildings, which may be found convenient for the accommodation of their business, and of the horses and carriages and travelers passing over said road."

The defendants denied the authority of Macomber to make such a contract in behalf of the corporation, and the power of the corporation under its charter either to authorize or enter into such a contract.

*Kittredge & Bellows*, for the plaintiffs.

*George & Foster*, for the defendants.

BELL, C. J.<sup>1</sup> Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established. *Trustees v. Peaslee*, 15 N. H. 330; *Perrine v. Chesapeake Canal Co.*, 9 How. 172. In giving a construction to the powers of a corporation, the language of the charter should in general neither be construed strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation. *Enfield Bridge v. Hartford R. R.*, 17 Conn. 454; *Strauss v. Eagle Co.*, 5 Ohio (N. S.) 39.

If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorporation.

In the present case the power to take the lands of others, and to take tolls of travelers, must be strictly construed, if doubts should arise on those points; but it is not seen that the other grants to the defendant corporation should not receive a fair and natural construction.

The charter of the Mount Washington Road empowers them to lay out, make and keep in repair, a road from Peabody River Valley to the top of Mount Washington, and thence to some point on the north-west side of the mountain. It grants tolls on passengers and carriages, and authorizes them to take lands of others for their road, and to build and own toll-houses, and erect gates, and appoint toll-gatherers to collect their tolls. The remaining provisions contain the ordinary powers of corporations, relating to directors, stock, dividends, meetings, &c. Laws of 1853, chapter 1486.

This charter confers the usual powers heretofore granted to turnpike corporations, and no others. The most natural and satisfactory mode of ascertaining what are the powers incidentally granted to such companies, is to inquire what powers have been usually exercised under them, without question by the public or by the corporators. It may be safely assumed that the powers which have not heretofore been found necessary, and have not been claimed or exercised under such charters, are not to be considered generally as incidentally granted.

<sup>1</sup> BELLOWS, J., did not sit.

Such charters have in former years been very common in this and other States, and they have not, so far as we are aware, been understood as authorizing the corporations to erect hotels, or to establish stage or transportation lines, to purchase horses or carriages, or to employ drivers in transporting passengers or freight over their roads; and no such powers have anywhere been claimed or exercised under them. We are, therefore, of opinion that the power to establish stage and transportation lines to and from the mountain, to purchase carriages and horses for the purpose of carrying on such a business, was not incidentally granted to the defendant corporation by their charter. *State v. Commissioners*, 3 Zab. 510.

But it is contended that the power to make this contract is conferred by the act in amendment of the charter, passed July 12, 1856. By this act the corporation may "erect and maintain, lease and dispose of any building or buildings which may be found convenient for the accommodation of their business, and of the horses and carriages and travelers passing over their said road." By *their business*, which the buildings to be erected were designed to accommodate, it is said the legislature must have intended some permanent and continuing business beyond that of merely building and maintaining a road; and that it could be no other than that of erecting a hotel on the mountain, and establishing lines of carriages, for the purpose of carrying visitors up and down the mountain.

But the foundation of this implication is very slight. The express grant is of an authority to erect, &c., buildings, not of all kinds, but such as may be found convenient for the accommodation of their business, and of travelers, &c. The business here referred to must be understood to be such as they are by their charter authorized to engage in. If nothing had been said of horses and travelers, there could hardly be any foundation for the idea that a hotel could have been contemplated by the legislature. Buildings suitable for the accommodation of their toll-gatherers and workmen employed on their road, would probably be thought every thing the legislature intended to authorize by this additional act. Connected as this authority now is with travelers, horses and carriages, there is scarce a pretence for argument, that this additional act goes any further than the original act, to authorize a stage and transportation company. It is not unlikely that some of the projectors of this enterprise intended to secure much more extensive rights than those of a turnpike and hotel company, but it seems certain they have not exhibited this feature of their case to the legislature so distinctly as to secure their sanction, and the charter and its amendment as yet justifies them in no such claim.

The power of buying and selling real and personal property for the legitimate purposes of the corporation, and the power of contracting generally for the same purposes, within the limits prescribed by the charter, being granted, we understand the principle to be, that their

purchases, sales, and contracts generally, will be presumed to be made within the legitimate scope and purpose of the corporation, until the contrary appears, and that the burden of showing that any contract of a corporation is beyond its legitimate powers, rests on the party who objects to it. *Indiana v. Woram*, 6 Hill 37; *Ex parte Peru Iron Company*, 7 Cow. 540; *Farmer's Loan v. Clowes*, 3 Comst. 470; *Same v. Curtis*, 3 Seld. 466; *Biers v. Phenix Company*, 14 Barb. 358.

If a corporation attempt to enforce a contract made with them in a case beyond the legitimate limits of their corporate power, that fact being shown, will ordinarily constitute a perfect defence. *Green v. Seymour*, 3 Sandf. Ch. 285; *Bangor Boom v. Whiting*, 29 Me. 123; *Life &c. Company v. Manufacturers &c. Company*, 7 Wend. 31; *New-York &c. Insurance Company v. Ely*, 5 Conn. 560.

And if a suit is brought upon a contract alleged to be made by the corporation, but which is shown to be beyond its corporate power to enter into, the contract will be regarded as void, and the corporation may avail themselves of that defence. *Beach v. Fulton Bank*, 3 Wend. 573; *Albert v. Savings Bank*, 1 Md. Ch. Dec. 407; *Abbot v. Baltimore &c. Company*, 1 Md. Ch. Dec. 542; *Strauss v. Eagle Insurance Company*, 5 Ohio (N. S.) 59; *Baron v. Mississippi Insurance Company*, 31 Miss. 116; *Bank of Genesee v. Patchin Bank*, 3 Kern. 315; *Gage v. Neumarket*, 18 Q. B. 457.

The contract set up in this case was made not by the corporation itself, by a vote, nor by an agent expressly authorized to sign a contract already drawn, but it was made by the president of the corporation, acting under an appointment as their general agent; and it is argued that he was fully authorized by votes of the corporation to bind them by such a contract as the present; but it is not necessary to consider this question, as we think it settled that the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. This principle is distinctly recognized in *McCullough v. Moss*, 5 Den. 567; overruling the case of *Moss v. Rossie Lead Co.*, 5 Hill 137, and in *Central Bank v. Empire Co.*, 26 Barb. 23; *Bank of Genesee v. Patchin Bank*, 3 Kern. 315.

The same want of power to give authority to an agent to contract, and thereby bind the corporation in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. 5 Den. 567, above cited. The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further.

This view seems to us entirely conclusive against the claim made for the omnibuses and model, and probably for the baggage wagon.

As to the light wagon, that may stand on a different ground. Such a wagon might be useful and necessary for the use of the agent of the company, in conducting the undoubted business of the corporation — the building and maintaining the road.

We are unable to assent to the position taken in the argument, that a ratification of part is a ratification of the whole contract. While the corporation may be restricted from ratifying a contract beyond the scope of the objects of the corporation, there could be no such objection as to any matter clearly within their power. The other contracting party might have a right to reject such ratification, claiming that the contract is entire, and if not ratified as such, it should not be made good for a part only. But if they claim the benefit of the partial ratification, the corporation can hardly object.

\* *N.V. Dalem.*

### § PROPRIETORS OF THE STOURBRIDGE CANAL v. WHEELLEY.

1831. 2 *Barnewall & Adolphus*, 792.

THIS case was argued in the last term<sup>1</sup> by Sir *James Scarlett* for the plaintiff, and *Campbell* for the defendants. The facts of the case, the several clauses of the act of parliament upon which the question arose, and the arguments urged, are so fully stated and commented on in the judgment delivered by the Court, that it is deemed unnecessary to notice them here.

*Cur. adv. vult.*

LORD TENTERDEN, C. J., in the course of this term, delivered the judgment of the Court.

This case was argued before us in the last term. It was an action of *assumpsit* brought by the plaintiffs to recover the sum of 492*l.* 9*s.* as a compensation for the use of a way or passage for boats loaded with coals and other merchandise, along a part of the plaintiffs' canal, made under the powers of the 16 G. 3, c. 28, an act of parliament for making and maintaining the Stourbridge Canal with two collateral cuts. This canal was formed upon two levels; the upper or summit level, which communicates with the Dudley Canal, then intended to be made and since completed; upon the whole of which level there is no lock; and the lower or Stourbridge level, extending from Stourbridge to Stourton; and the two levels are connected by a chain of sixteen locks. The defendants have carried large quantities of coals and other goods, part from the Dudley Canal, part not, along the upper level, without

<sup>1</sup> Before Lord TENTERDEN, C. J., LITLEDAL, PARKER, and TAUNTON, JEs.

*Here a special act, incorp. so (constructed most strongly in favor of public.*

passing through any lock. Until recently they have paid to the plaintiffs a compensation in the nature of tonnage for the coals and goods so carried, as other persons have also done; but the defendants having latterly refused to do so, this action has been brought; and the question is, whether the plaintiffs are entitled to demand anything for the use of the part of the canal on which the defendants have so navigated; if they are, the sum claimed is admitted to be reasonable, and the plaintiffs are entitled to recover it: if they are not, the previous payments by the defendants cannot render them liable, and the plaintiffs cannot recover anything.

The canal having been made under the provisions of an act of parliament, the rights of the plaintiffs are derived entirely from the act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not *clearly* given to them by the act. This rule is laid down in distinct terms by the Court in the case of *The Hull Dock Company v. La Marche*, 8 B. & C. 51, where some previous authorities are cited; and it was also acted upon in the case of *The Leeds and Liverpool Canal Company v. Hustler*, 1 B. & C. 424.

Adopting this rule, we are to decide whether a right to demand some compensation for the use of this part of the canal, is *clearly and unambiguously* given to the plaintiffs by this act of parliament; and we think it is not.

The act of parliament recites that the proposed canal will be of public utility (p. 732); the company are empowered to purchase land for the use of the navigation (p. 748); the lands acquired by voluntary or compulsory sale are vested in the proprietors for the use of the navigation, and for no other use or purpose whatsoever (p. 759); and all persons whatsoever are to have free liberty "to navigate upon the canal and collateral cuts with any boats or other vessels" of certain dimensions, "and to use the wharfs and quays for loading and unloading any goods, wares, merchandise, and commodities; and also to use the towing paths with horses for hauling and drawing such boats and vessels *upon payment of such rates and dues as shall be demanded by the said company of proprietors not exceeding the rates before mentioned in the statute*" (p. 788). This refers to a previous clause, p. 777, which provides that, in consideration of the great charge and expense of the proprietors in making, maintaining, and supplying with water the canal and collateral cuts, &c., it shall be lawful for the company from time to time to ask, demand, take, and recover for their own use and benefit for the tonnage and wharfage of iron, &c., and other commodities navigated, carried, and conveyed thereon, such rates and duties as they shall think fit, not exceeding the sum of sixpence for every ton of iron, &c., navigated on any part of the canal, and

which shall pass *through any one or more of the locks* which shall be erected on the said canal. A similar provision is made for the tonnage and wharfage of goods in vessels navigated on the collateral cuts; and a power of bringing an action for arrears or distraining is given to the company.

Now, it is quite certain that the company have no right *expressly* given to receive any compensation except the tonnage paid for goods carried through some of the locks on the canal or the collateral cuts; and it is therefore incumbent upon them to show that they have a right *clearly* given by inference from some of the other clauses.

One of the clauses relied upon by the plaintiffs is that which gives the public the use of the canal, p. 788, and it is contended that no persons have a right to use any part of the canal under that clause, except those who actually do pay some of the rates or dues, and consequently pass some of the locks; and that if individuals have no right to navigate a particular part, the company may make their own bargain as to the terms upon which they may be permitted to do so.

But the clause in question is capable of two constructions; one, that those persons who pass the locks, and therefore pay the rates, and those *only*, are entitled to navigate any part of the canal or cuts; the other, that all persons are entitled to use it, paying rates when rates are due. The former of these constructions is against the public and in favour of the company, the latter is in favour of the public and against the company, and is therefore, according to the rule above laid down, the one which ought to be adopted. — *Two constructions.*

And indeed the more obvious meaning of this clause is, to declare that the canal is dedicated to the public, but, at the same time, to preserve the right of the company to the rates already given; and it is reasonable to suppose that, by the section p. 777, which gives the rates as a compensation for the expenses of the proprietors, the legislature meant to include *all* the benefit they were to derive from the canal, and not to leave the company to make what agreement they pleased with the public in cases not provided for, and to gain an unlimited profit from a particular part of it. They probably did not contemplate the case of persons using the canal who did not pass any lock; but whether the omission was intentional, or arose from inadvertence, it is still an omission in that clause which provides for the emolument of the company. *Regulation.*

Another section upon which some reliance was placed, was that in page 789, which gives to the owners of adjoining lands the power to use any pleasure boats on the canal, &c. (so as the same do not pass through any lock), without paying any rates or dues for the same, and so as such boat be not *used for carrying any goods*; and it is argued that the inference arising from the latter part of this clause is, that pleasure boats carrying goods would be liable to pay rates, though they should pass no locks; and if pleasure boats, then all other boats should be equally liable. And there is no doubt but that this provision does

afford some colour for this argument. The object of the clause appears to have been, partly to secure the right of the proprietors to use the canal with pleasure boats; (and in that respect it was introduced pro majore cautela;) and partly to prevent the company being injured by their passing through locks; and the framer of the clause seems to have added the last provision in the section merely to put pleasure boats with goods on board, on the footing of loaded vessels, without considering whether loaded vessels were liable to duties or not. At any rate this clause is not sufficient, in our judgment, to enable us to say that it is *clear* the legislature intended to give the plaintiffs the right to the compensation claimed for the use of a part of the canal where there is no lock.

Upon the principle of construction, therefore, above laid down, viz., that the company are entitled to impose no burthen on the public for their own benefit except that which is clearly given by the act, we are of opinion that, as their right to claim this compensation is not clearly given by the act, the plaintiffs are not entitled to recover.

*Judgment for defendants.*

### 37 WHITAKER v. DELAWARE & HUDSON CANAL CO.

1878. 87 Pa. State, 34.

CASE to recover for damages to plaintiff's lumber rafts while passing through the schute of defendants' dam.

TRUNKY, J. The defendants were incorporated under the laws of New York, and by divers statutes of this state, are vested with certain public franchises. For the purposes of the grant the dam across the Delaware River was built about fifty years ago, and the right to maintain it is conceded. In the Act of 1825, Pamph. L. 142, is a provision "That the said company shall not erect any works, or make any improvement, connected with the Delaware River, unless the same shall be so constructed as to leave the channel of said river as safe and as convenient for the descent of rafts as it now is." The plaintiff complains that the river is not as safe and convenient for navigation as before the erection of the dam. Unquestionably this is so. A dam in a stream is an impediment and in some degree renders its navigation less safe and convenient. A literal construction of this provision makes it impossible to build and maintain the dam, and the conceded right vanishes. The statutes of this state, recognizing those of New York, and in connection therewith, conferring the power to construct a great public highway, are nugatory under a strict construction of the section providing for safe and convenient navigation of the river. This was not the legislative intent. It could not have been intended to grant a franchise to build a public highway, in connection with one in a sister state, and so clog it that the work could never be executed.

Various statutes, from time to time, have been enacted authorizing public improvements, some of which would obstruct or impede the

navigation of rivers, and others the use of streets and roads, which contained provisions forbidding such obstructions and impediments. The courts have uniformly held that these provisions should be liberally construed, so as not to destroy the grant. For instance, the act of incorporation of the Monongahela Bridge Company contained a declaration that nothing therein contained should authorize the erection of a bridge over the Monongahela river "in such manner as to injure, stop, or interrupt the navigation of the said river, by boats, rafts or other vessels." It was held that the proviso was not intended to prevent the erection of piers in the bed of the river, yet piers in the bed of a navigable stream inevitably endanger navigation and render it more difficult. They do not necessarily "injure, stop or interrupt the navigation" in the sense in which these words were used by the legislature. A strict literal meaning was not intended, and in the very nature of things, it never could have been. When the purpose of the franchise is the performance of a public act, the grant is to be so interpreted as to enable the act to be done. The extension of one highway over another is a public act, and not less so because of the power to exact tolls: *Monongahela Bridge Co. v. Kirk*, 10 Wright, 112. The charter of the Erie and North East Railroad Company had a provision that "The said railroad shall be so constructed as not to impede or obstruct the free use of any public road, street, lane or bridge now laid out, opened or built." "These words taken literally and in their strongest sense would prevent the railroad from being made on the streets at all. But we follow authority in saying they are not to be so interpreted. The defendants have a right to use a street if they take care to obstruct it as little as the nature and character of their improvement will permit, if they create no material or unnecessary impediment—no obstruction which could be avoided by any reasonable expenditure of money or labor. They cannot occupy the whole of a street and drive the public away from it altogether. But any street which is wide enough for the railroad and public both may be used on the terms mentioned." Per BLACK, C. J., *Commonwealth v. E. & N. E. Railroad Co.*, 3 Casey 365.

It is no departure from the current of decisions, but in its direct line, to hold that the defendants can enjoy their franchise, can lawfully construct and maintain their dam, taking care to obstruct the channel as little as the nature and character of the improvement will permit, and leaving it as safe and convenient for the navigation of rafts as could be by any reasonable expenditure of money and labor. Their franchise is for the construction of one highway over another. The whole community are interested in both. Private charters are strictly interpreted. In them what is not expressed or necessarily implied, is not granted, and what is doubtful is resolved in favor of the sovereign. But when the sovereign grants a public franchise over a highway, a clause relative to the use of said highway will not be so construed as to defeat the grant.

The plaintiff does not claim merely for consequential damages, re-



sulting solely from the construction of the dam. If he did, the defendants' answer would be found in *Clark v. Birmingham and Pitts. Bridge Co.*, 5 Wright 147, and *Monongahela Bridge Co. v. Kirk*, *supra*.

He claims further for an immediate injury, consequent upon the defendants' negligence, in that they "built and left the said dam in and across said highway, in a dangerous, insecure and impassable state and condition." His averment implies much more than such obstruction as was necessary for the purposes of the franchise, and, if established, and there was no contributory negligence, his right to recover is clear. If he adduced sufficient proof of such negligence, it should have been submitted to the jury.

[After considering the evidence, the Court held, that it was insufficient to warrant a finding that the defendants were guilty of negligence.]

*Judgment affirmed.*

2. NICOLL v. NEW YORK & ERIE R. R. CO.

1854. 12 *New York*, 121.<sup>1</sup>

EJECTMENT commenced in the supreme court in February, 1847, and tried at the Orange county circuit, held by Mr. Justice Edwards in October, 1848. The jury found a special verdict, from which it appeared that on the first day of July, 1836, Nicholas A. Dederer, being the owner in fee simple of a farm situate in Blooming Grove, Orange County, executed to the Hudson and Delaware Railroad Company a deed, dated that day, whereby, in consideration of the benefits and advantages to him of the railroad proposed to be made by the company, and of one dollar to him paid by the company, he granted to such company the privilege of surveying and laying out, by its agents and engineers, through his farm or tract of land, the route and site of its road; and also granted, bargained, sold, and conveyed unto the company and its successors, so much of the farm as might be selected and laid out by the company for the site of its railroad, six rods in width across the farm; provided always, and such grant was made upon the express condition, that the company should construct its railroad within the time prescribed by the act incorporating the same. That subsequently, and before the 27th of October, 1836, the company selected and laid out, for the site of its railroad through the farm, a strip of land six rods wide extending through the farm. That on the first of April, 1844, the farm formerly owned by Dederer, by virtue of sundry mesne conveyances, became the property of the plaintiff in fee simple, subject only to such right as the Hudson and Delaware Railroad Company then had to any portion thereof sufficient for the track of its

<sup>1</sup> Arguments omitted. — Ed.

road. That this company, on the 27th of October, 1836, commenced the construction of its railroad, but never completed or put in operation a double or single track, or any part thereof. That in pursuance of an act of the legislature, entitled an act authorizing the New York and Erie Railroad Company to construct a branch road, terminating at the village of Newburgh, passed April 8, 1845, the Hudson and Delaware Railroad Company were authorized to, and on the 14th of September, 1846, did execute to the defendant, the New York and Erie Railroad Company, a deed, and thereby for a valuable consideration granted, bargained, sold, and conveyed to the defendant and its successors, the maps, charts, drafts, surveys, and other personal property of the Hudson and Delaware Company, and all its rights, privileges, immunities and improvements, acquired under and by virtue of the original act of incorporation, or of any act amending it, or in any other manner; and also all the grants, lands, and real estate acquired by or ceded or conveyed to the Hudson and Delaware Company, and all its right, title, and interest to the same, and particularly the right of way, granted by Dederer to the company and its successors, by the deed from him above mentioned. That when this suit was commenced, on the 25th of February, 1847, the defendant had not completed or put in operation its branch road terminating at Newburgh, or any part of it, nor had it done so when the cause was tried. That on the 2d of December, 1846, the defendant entered upon the strip of land six rods wide, mentioned in the deed from Dederer and laid out by the Hudson and Delaware Company through his farm as the site of its road, and ejected the plaintiff therefrom, and that the defendant was still in the possession thereof. The suit was brought to recover possession of this strip of land from the defendant. f. cult.

The justice before whom this cause was tried ordered judgment upon the special verdict in favor of the plaintiff. The defendant appealed, and the supreme court, sitting in general term in the 3d district, reversed the judgment and gave judgment in favor of the defendant. (*See 12 Barb.*, 460.) The plaintiff appealed to this court.

*E. L. Fancher*, for appellant.

*T. M. Kissock*, for respondent.

PARKER, J. The grant from Dederer to the Hudson and Delaware Railroad Company, bearing date the first day of July, 1836, was made to that company "and their successors." Under that grant, there can be no doubt the Hudson and Delaware Railroad Company took a fee. The words of perpetuity used would have been sufficient to describe a fee, even under the most strict requirements of the common law.

The company had ample power to purchase lands. It was a power incident at common law to all corporations, unless they were specially restrained by their charters or by statute. (2 *Kent*, 281; *Co. Litt.*, 44 a, 300 b; 1 *Kyd on Corp.*, 76, 73, 108, 115; 3 *Pick.* 239.) And in this case the power was expressly conferred by the 9th section of the charter (*Sess. Laws of 1835*, p. 113); and by the 16th section there

were given to it the general powers conferred upon corporations (1 R. S. 731), one of which is that of holding, purchasing and conveying such real estate as the purposes of the corporation may require. But if no words of perpetuity had been used, the grantor owning a fee, the company would have taken a fee; for the statute is now imperative, that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant. (1 R. S., 748, § 1.)

But it is objected that because, by the act of incorporation, there was given to it only a term of existence of fifty years (*Laws of 1835*, p. 110, § 1), therefore the grant shall be deemed to have conveyed an estate for years, and not in fee. The unsoundness of that position is easily shown. It was never yet held, that a grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it were so, a grant could never be made to an individual in fee, because, in his earthly existence, he is not immortal. Under such a rule, a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates, except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing, but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition further to show its absurdity.

It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute. (1 R. S., 748, § 1.) The change made by the statute favors the grantee, where there are no express terms in the grant, by the presuming the grantor intended to convey all his estate.

At common law, it was only where there were no express terms, defining the estate in the conveyance, that the term of legal existence of the grantee was deemed to be the measure of the interest intended to be conveyed. Thus, words of perpetuity, such as "heirs or successors," were necessary to convey a fee. A grant to an individual, without such words, conveyed only a life estate. For the same reason a grant, without such words, to a corporation aggregate (*Viners Ab., Estate, L. 3*), or to a mayor or commonalty (*ib.*, 3), conveyed a fee, because the grantees were perpetual. The grantee named in such case having a perpetual existence, the estate could not have been enlarged by words of succession.

But this is now changed by our Revised Statutes. Words of inheritance or succession are no longer necessary, and, in their absence, we look, not to the term of existence of the grantee to ascertain the estate, but to the amount of interest owned by the grantor at the time he conveyed. All his estate is deemed to have passed by the grant. (1 R. S., 748, § 1.)

All this is applicable only to cases where the grant is silent as to

the extent of interest conveyed. Where that interest is expressly described, as in this case, the law never, either before or since our revision, did violence to the intent of the parties, by cutting down the estate agreed to be conveyed to the measure of the grantee's term of existence. It has long been one of the maxims of the law, that "no implication shall be allowed against an express estate limited by express words." (*Viner's Ab., Implication, A.*, 5; 1 *Salk.*, 286.)

It is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation, by which its full value may at once be realized.

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient. (5 *Denio*, 389; 2 *Preston on Estates*, 50.) Kent says: "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee, for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; <sup>1</sup> but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter. (2 *Kent*, 282; 5 *Denio*, 389; 1 *Comst. R.* 509.) Large sums of money are accordingly expended by railroad companies in erecting extensive station houses and depots, and by banking corporations in erecting banking houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence.

The Hudson and Delaware Railroad Company then, by their grant from Dederer, took a title in fee, but it was a fee upon condition, there being in the grant an express condition that the road should be constructed by the company within the time prescribed by the act of incorporation. This was not a condition precedent, as was argued by the plaintiff's counsel, but a condition subsequent.

Kent says (4 *Kent*, 129): "Conditions subsequent are not favored in the law and are construed strictly, because they tend to destroy estates." They can only be reserved for the benefit of the grantor and his heirs, and no others can take advantage of a breach of them. (4 *Kent Com.* 122, 127; 2 *Black. Com.*, 154.) The plaintiff took his deed of the farm on the first of April, 1844. This was one year before the expiration of the time for constructing the road, and two years before the Hudson and Delaware Railroad Company conveyed to the defendants. At that time, therefore, there had been no breach of the condition; on the contrary, the right of the company was expressly recognized and reserved in the deed. Certainly, then, Dederer, when he conveyed, had no assignable interest.

See 434-435

Judgment affirmed.

Implication of half of fee simple left on dissolution in Ca's 13 A. 1012  
Newer cases is reversed

Case shows here far doctrine of implied powers is carried: - Genl powers in corps to take either by purchase or devise or bequest such prop as is appropriate to. Do not think if you must have a prohibition N.Y. Stat did not prohibit taking Conn land. If not, the charter provided Corp shd n. take any RE by devise then no doctrine of implied powers and over ride that either in N.Y. or Conn.

## WHITE v. HOWARD.

1871. 38 Conn. 342.<sup>1</sup>

Heirs claim that BILL IN EQUITY by the executors of the will of William Bostwick, devise. RE in Conn praying for advice in the construction of the will. The residue, both to N.Y. Charitable Corp real and personal, was devised to trustees, to be applied for the benefit of testator's daughter during her life. If the daughter should die leaving no husband or issue, a certain part of the trust fund was to be divided between six societies, of which the American Tract Society, a New York corporation, was one. The daughter died, leaving neither husband nor children. Counsel for the heirs-at-law of the testator contend that the American Tract Society is incapable of taking real estate in Connecticut by devise, and that the residuary clause must fail so far as it attempts to devise real estate in Connecticut to that corporation.

*H. White and J. S. Beach*, for petitioners.

*Doolittle and L. N. Bristol*, for heirs of testator.

*D. B. Beach*, for heirs of daughter.

*J. W. Edmunds, Cook, Campbell, G. N. Titus, T. Westervelt, A. L. Edwards, S. E. Baldwin*, for various Societies.

FOSTER J.

It is asserted that the American Tract Society can take neither real or personal property under this will. That it cannot take real, because its charter of incorporation, granted by the state of New York, does not confer the power of taking by devise; that it cannot take personal, because the charter provides that the net income of said society arising from real and personal estate shall not exceed the sum of \$10,000 annually. This limit it is claimed has been reached and exceeded, and so the capacity of the society to take property is exhausted. This society was incorporated by a special act of the legislature of the state of New York, passed May 26, 1841. The third section of its charter provides that the corporation shall possess the general powers, and be subject to the provisions, contained in title 3d of chapter 18 of the first part of the revised statutes, so far as the same are applicable and have not been repealed. The title and chapter referred to enumerate the powers of corporations, and the clause which bears directly upon this subject reads thus: "to hold, purchase, and convey such real and personal

<sup>1</sup> Statement abridged. Only so much of the opinion is given as relates to one point. Arguments omitted.—Ed.

N.Y. law on devises provides still & devises shall n. be made to any corp except such as are expressly auth'd to take. Does this Stat limit authy of corp or testamentary capacity of devisors. Take up re *McQuarrie*.

estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." This charter was amended by the legislature of New York on the 31st of March, 1866, but as this was after the death both of the testator and of his daughter, that amendment need not be particularly considered, as it cannot materially affect the question involved. Now it is manifest that this corporation has express power by its charter to hold, purchase and convey real and personal estate, for specified purposes and to a limited amount. There is no express power to take by devise, nor is the power so to take expressly prohibited. We suppose there could be no doubt that this corporation could take by devise in New York, if the Statute of Wills of that state empowered corporations generally to take in that manner. The English Statute of Wills, passed in the time of Henry VIII, authorized every person having a sole estate in fee simple of any manors &c., "to give, dispose, will, or devise, to any person or persons, *except to bodies politic and corporate*, by his last will and testament in writing, or otherwise by any acts lawfully executed in his lifetime, all his manors &c., at his own will and pleasure, any law, statute, custom, or other thing theretofore had, made, or used to the contrary notwithstanding." Thus corporations, by express exception in these statutes, were not enabled to take lands directly by devise in England, and the Statute of Wills of the state of New York makes the same exception. By that statute it is enacted, that all persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate by a last will and testament duly executed &c. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise." 3 N. Y. Rev. Stat., 138, (5th ed.). This corporation therefore, prior to the recent amendment of its charter, could not take by devise in New York,<sup>1</sup> and such is the decision of their Supreme Court and Court of Appeals in this very case. And so it is earnestly contended that it cannot take by devise in Connecticut. We yield readily to the doctrine laid down in this connection in regard to corporations; indeed it is too thoroughly established to be doubted or questioned. That doctrine perhaps is nowhere better stated than in the case of *Head v. Providence Ins. Co.*, 2 Cranch, 127, by the then illustrious head of the Supreme Court of the United States, the late Chief Justice MARSHALL. "It [a corporation] may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." Now this corporation stands at the bar of this court claiming the right to take lands within

As to devises  
no express  
either way

N.Y. Stat. will

<sup>1</sup> Corporations "always had the right at common law to take personal property by bequest; . . . and I entertain no doubt that they have that right under our statutes." WRIGHT, J., in *Sherwood v. Am. Bible Society*, 4 Abbott, N. Y. App. Dec. 237, p. 231. — ED.

our territory by devise. It is clothed with such powers as have been conferred by its charter. Those, a portion of them, as we have seen, are to hold, purchase, and convey real estate. It is not expressly authorized to take by devise, nor is it prohibited from so taking. Can it then take by devise? Not in New York, as we have seen. Therefore not in Connecticut, say the counsel for the heirs at law, for being a New York corporation, and by the law of that state devoid of power to take by devise, no argument is needed to show its inability to take by devise in Connecticut. This conclusion is too hastily drawn. If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion would be legal and logical. But the inability does not so arise. There is no prohibition in the charter; the inability is created by the New York Statute of Wills, expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York Statute of Wills and cannot bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take created by the statute of a state, which is local, and a prohibitory clause in the charter, which everywhere cleaves to the corporation. The reasoning is fallacious, not recognizing this distinction. There being no prohibition in the charter, and the power to hold and convey real estate being expressly given, we must look to our own statutes and laws, and not to those of New York, to determine whether or not this corporation can take by devise in Connecticut.

The state of New York has partially adopted the policy of England in regard to devises to corporations, though the English statutes, usually called the statutes of mortmain, have not been reenacted in that state. Those statutes began with *Magna Charta*, in 9 Henry III, and embrace a succession of acts down to and including 9 George II. They were intended to check the ecclesiastics of the Roman church from absorbing in perpetuity, in dead clutch, all the lands of the kingdom, and so withdrawing them from public and feudal charges. *Shelford on Mortmain*, 2. By the statute of 43 Eliz., ch. 4, known as the Statute of Charitable Uses, lands may be devised to a corporation for a charitable use, and the court of chancery will support and enforce such devises. Whether a court of equity has power to execute and enforce such trusts, as charities, independent of any statute, is a question which has been much discussed, and very high authorities can be quoted both in favor and against the exercise of such a power. We think the latter and better opinion to be in favor of an original and necessary jurisdiction in courts of equity as to devises in trust for charitable purposes, when the general object is sufficiently certain, and not contrary to any positive rule of law. It is unnecessary however to decide this question, for in this state we have no statutes of mortmain; no exception in our Statute of Wills prohibiting corporations from taking by devise; aliens, resident in this state or in any of the United States, may purchase, hold, inherit, or transmit real estate, in as full and ample a manner as

native born citizens; their wives are entitled to dower; their children and other lineal descendants may inherit; and we have besides a statute, passed in our colonial days in 1702, in effect reenacting the statute of 43 Elizabeth, and containing indeed more liberal and comprehensive provisions to sustain devises of this description than are contained in the 43 Elizabeth. That act provides, that "all lands, tenements, or other estates, that have been or shall be given or granted by the General Assembly, or any town or particular person, for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be given or granted, according to the true intent and meaning of the grantor, and to no other use whatever."

We therefore entertain no doubt that the American Tract Society can take by devise in this state. As to the other objection, that having an income greater in amount than is allowed by its charter it has exhausted its power to take, it suffices to say that no such fact is found by the very competent committee whose report is on the record.

CC 1276, p. 316

### BRADBURY v. BOSTON CANOE CLUB.

1891. 153 *Massachusetts*, 77.

HOLMES, J. This is an action upon a promissory note for one hundred and fifty dollars and interest, given by the defendant to the plaintiff for money lent to it by the plaintiff to be used in building a club-house. There is a second count for money lent. At a meeting, duly called, the corporation passed a vote authorizing its treasurer to borrow money in terms sufficiently broad to cover the loan in question. The suggestion that no sufficient notice of the business to be transacted was given, does not seem to us fairly open on the agreed facts. Moreover, it would be impossible to argue that the defendant had not recognized and ratified the act of its treasurer in borrowing from the plaintiff. The money was received by the corporation, and was used by it for the purpose mentioned. The only question for us is, whether the corporation acted illegally in borrowing money for the purpose of erecting a club-house upon land of which it held a lease.

The defendant is a corporation formed under the Pub. Sts. c. 115, § 2, for encouraging athletic exercises. By § 7 it "may hold real and personal estate, and may hire, purchase, or erect suitable buildings for





and that power being vested in the directors without restriction, it must follow that they, and they alone, are authorized to make it. It is the duty of the directors to care for the creditors, and when the corporation becomes crippled and unable to meet its obligations in the usual course of business, it is competent for the directors to make an assignment, and this they may do without the consent of the stockholders. This conclusion has the support of adjudications of this and other courts. *Chew v. Ellingwood*, 86 Mo. 260; *Dana v. The Bank of the United States*, 5 W. & S. (Pa.) 223; *DeCamp v. Alward*, 52 Ind. 473. The directors may, with propriety, consult with the stockholders, but under the circumstances just stated, and in the exercise of their best judgment, they may make the assignment even against the expressed will of the stockholders. Of the cases relied upon by the appellants, that of *Abbott v. American Hard Rubber Co.*, 33 Barb. 580, was not an assignment for the benefit of creditors. There the trustees attempted, through the form of a sale, to secure to themselves the property of the corporation at the expense of the other stockholders. The sale was voidable, as to the stockholders not consenting, though a majority agreed to the transaction.

37 CHICAGO CITY RAILWAY COMPANY v. ALLESTON.

1873. 18 Wallace (U. S.), 233. Cf. 147/581-3259 as to > 1 ed. by

APPEAL from the Circuit Court for the northern district of Illinois; the case being thus:

The Chicago City Railway Company was a corporation owning a street railroad in Chicago. The directors of the company, without consulting the stockholders or calling a meeting of them, resolved to increase the capital stock of the company from \$1,250,000 to \$1,500,000. To this one Allerton, who was a stockholder, objected, and filed a bill praying for an injunction to prevent the increase. His position was that it could not be lawfully made without the concurrence of the stockholders, and in support of this view he relied upon the constitution of Illinois, adopted in July, 1870, by the thirteenth section of the eleventh article of which it is declared as follows:—

“No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock-dividends, and other fictitious increase of the capital stock, or indebtedness of any such corporation, shall be void. The capital stock of no railroad corporation shall be increased for any purpose, except upon giving sixty days' public notice in such manner as may be provided by law.”

He also relied on an act of the legislature of Illinois, passed March 26th, 1872, to execute and carry out the above provision of the consti-

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tution, by which, amongst other things, it was enacted that no corporation should change its name or place of business, increase or decrease its capital stock, or the number of its directors, or consolidate with other corporations, without a vote of two-thirds of the stock at a stockholders' meeting.

The railway company, in its answer, relied upon its charter, granted February 14th, 1859, the third and fourth sections of which were as follows:

"SECTION 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation.

"SECTION 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint."

The position of the company was that the third section conferred an unrestricted right to increase the capital stock at will, and that the fourth vested this power in the board of directors, and that the constitutional provision and act above referred to, if applied to this corporation, would impair the validity of the contract. It was further set up, however, that the said provision did not apply to railways worked by horse-power. The court decreed in favor of the complainant and the company took the present appeal.

*Mr. Charles Hitchcock*, for the appellant; *Mr. D. A. Storrs*, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

Without attempting to decide the constitutional question, or to give a construction to the act of the legislature, we are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association.

Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter; but such a law should regularly be accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but in some form or other it must be given to render the increase valid and binding on them. Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their char-

acter, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious.

First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust.

Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders, would be to make them members of an association in which they never consented to become such. It would change the relative influence, control, and profit of each member. If the directors alone could do it, they could always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not bind the stockholders without their acceptance of it, or assent to it in some form. Even when the additional stock is distributed to each stockholder *pro rata*, it would often work injustice, because many of the stockholders might be unable to take their respective shares, and might thus lose their relative interest and influence in the corporate concern.

These conclusions flow naturally from the character of such associations. Of course, the associates themselves may adopt or assent to a different rule. If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote, in the regular way. Perhaps a subsequent ratification or assent to a change already made, would be equally effective. It is unnecessary to decide that point at this time. But if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred.

Where the stock expressly allowed by a charter has not been all subscribed, the power of the directors to receive subscriptions for the balance may stand on a different footing. Such an act might, perhaps, be considered as merely getting in the capital already provided for the operations and necessities of the company, and, therefore, as belonging to the orderly and proper administration of the company's affairs. Even in such case, however, prudent and fair directors would prefer to have the sanction of the stockholders to their acts. But that is not the present case, and need not be further considered.

Decree affirmed. 1899. 403

Const. XI. No corp shall issue stock or bonds, except for & for, labor done, or prop actually recd & all fictitious increase of stock or indebtedness shall be void. The stock & bonded indebtedness of corp shall not be increased, except in pursuance of law, nor w/o consent & personal liability of larger amt in R. stock to meet req called for & purpose, giving body public notice as may be provided by law. C. Code. 309. Note of 2/3 subd or issued sh. - & called meetg. public & C. Code be demerited to an amt & indebtedness Corp Subd for meetg. Register elige

## CHAPTER III.

## WHAT ACTS ARE CORPORATE ACTS.

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(A) *Acts which the Corporation is authorized to do.*

## GASHWILER v. WILLIS.

1887. 33 *California*, 11.<sup>1</sup>

**ACTION** for false representation. The defendants were stockholders in a California corporation, The Rawhide Ranch Gold and Silver Mining Company. Plaintiffs averred that they were induced to purchase, on October 2, 1865, the company's mine; and that this purchase was induced by the false representations of defendants as to the terms of a trust deed which had been executed by the corporation to Barney, June 5, 1865, and under which other parties had a better title than plaintiffs acquired by their subsequent purchase in October.

On April 29, 1865, at a stockholders' meeting, at which all the stockholders were present, a resolution was unanimously adopted authorizing Turner, Willis, and Hodges, Trustees of the corporation, for and on behalf of the corporation, to sell and convey the mine to Barney. In pursuance of said resolution, and without any other authority shown, a conveyance was executed to Barney, on June 5, by said Trustees, purporting to be the deed of the corporation. The deed was signed by the Trustees, for and on behalf of the corporation; the Trustees affixing their own seals, "the said corporation having no seal."

On the trial, after proving the adoption of the resolution, plaintiffs offered in evidence the said deed of June 5, which was excluded by the court. To this exclusion, the plaintiffs excepted, and the case came up on appeal.

*H. P. Barber*, and *James H. Hardy*, for Appellants.

*John B. Hall*, and *Caleb Dorsey*, for Respondents.

SAWYER, J. . . .

Under the view we take, it will only be necessary to consider the

<sup>1</sup> Statement abridged. Argument and parts of opinion omitted. — Ed.

first ground of the objection, and the question is, does the instrument in question appear to be the act or deed of the corporation?

We are not aware of anything in the law, independent of any authority expressly conferred by the corporation, which authorizes Turner, Willis and Hodges, in their official character as Trustees, to execute the instrument in question on behalf of the corporation. No law of the kind has been called to our attention, and we do not understand that any is claimed by appellants' counsel to exist. And there is nothing in the nature of those offices, as connected with the object and business of the company, from which a general power in the Trustees, when not acting as a Board, to sell and convey the mine, mill and other property of the company, could be implied. (*McCullough v. Moss*, 5 Den. 575.) The parties executing the instrument, then, if they had any authority in the premises, must have derived it from some corporate act; and the only act proved or relied on is the resolution adopted at the stockholders' meeting before mentioned. This was a meeting of the stockholders only. It was called as such, and the proceedings all appear to have been conducted as a stockholders' meeting. The resolution authorizing the sale and conveyance of the mine, etc., in question, was adopted by the stockholders, as such, at said meeting, and not by the Board of Trustees, or at any meeting of said Board. The Board of Trustees do not appear to have ever acted at all upon the matter in the character of a Board, but the testimony shows that they acted in pursuance of the said resolution adopted at the meeting of stockholders.

Section five of the Act authorizing the formation of corporations for mining purposes provides: "That the corporate powers of the corporation shall be exercised by a Board of not less than three Trustees, who shall be stockholders," etc. And section seven provides that: "A majority of the whole number of Trustees shall form a Board for the transaction of business, and every decision of a majority of the persons duly assembled as a Board shall be valid as a corporate act." (Laws 1853, p. 88, Sec. 5; 7 Hittell's Gen. Laws, Arts. 936, 938.) Conferring authority to sell and convey the corporate property is the exercise of a corporate power, and under these provisions the "corporate powers of the corporation" are to be exercised by the Board of Trustees when the majority are "duly assembled as a Board." When thus assembled and acting the decision of the majority "shall be valid as a corporate act." We find nothing in the Act authorizing the stockholders, either individually or collectively in a stockholders' meeting, to perform corporate acts of the character in question. The property in question was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not in their individual capacities owners of the property as tenants in common, joint tenants, copartners or otherwise. (*Gorham v. Gilson*, 28 Cal. 484; *Mickles v.*

*Rochester City Bank*, 11 Paige, 128.) This proposition is so plain that no citation of authorities is needed. Had the stockholders all executed a deed to the property, they could have conveyed no title, for the reason that it was not in them (*Wheelock v. Moulton et al.*, 15 Vt. 521); and what they could not do themselves they could not by resolution or otherwise authorize another to do for them. The corporation could only act—could only speak—through the medium prescribed by law, and that is its Board of Trustees. As well might the citizens of San Francisco in public meeting assembled, by unanimous resolution authorize certain Supervisors, designated by name, to sell and convey the City Hall. It is said, however, that the Trustees were also all present and participated in the proceedings at the stockholders' meeting and assented to the resolution; that the resolution therefore was approved by all of the constituents of the corporation, and the powers of the corporation were exhaustively exercised. But they were acting in their individual characters as stockholders, and not as a Board of Trustees. In this character they were not authorized to perform a corporate act of the kind in question. As well, also, might a valid ordinance be passed by the citizens of San Francisco in public meeting assembled, at which the Supervisors were all present and voted in the affirmative. Such an ordinance, when signed by the Mayor, would have the assent of all the constituents of the corporation as clearly as the resolution in question has in the present instance. But such is not the mode in which the corporation is authorized by the law of its creation to manifest its will and exercise its corporate powers. The power to sell and convey could only be conferred by the Trustees when assembled and acting as a Board. This is the mode prescribed. As a Board they could perform valid corporate acts, and confer authority within the province of their powers, upon the Trustees individually or upon any other parties to perform acts as the agents of the corporation. We are not without authorities upon this precise point.

In *Conro v. Port Henry Iron Company*, 12 Barb. 27, the same question arose. A lease of the company's iron works was made in pursuance of a resolution adopted at a meeting of the stockholders at which the Directors were present. It was held that the resolution imparted no authority to make the lease. The Court say: "The stockholders in this case had no power to make a lease or do any other administrative act in the management of the affairs of the corporation. If a lease could be made at all, it could be executed only in pursuance of the act of the Directors, who are the body appointed by the charter for the management of its affairs. It is no answer that the individual stockholders, who were present at the meeting when the lease was ordered, were also Directors. They did not meet as Directors, but as stockholders. The Mayor and Common Council of a municipal corporation can only act in the manner prescribed by law. When not acting in their official character and in the mode prescribed by law,

their acts are no more binding than those of other private citizens. (See, per Lord Mansfield, *Rex v. Head*, 4 Burr. 2,515, 2,521.)" (Ib. 63.)

[After commenting on various cases.] These cases are in point, and none to the contrary have been called to our attention. They are the necessary consequence of the principles established by the great body of the authorities, that the corporate powers of corporations can only be exercised in the mode and through the instrumentalities prescribed by their charters. In this case, the resolution adopted by the stockholders was not a corporate act, and it conferred on the three Trustees named—whether they constituted the whole number of Trustees does not appear—no authority to perform a corporate act, to execute the deed, or adopt a seal for the occasion. It not only does not appear, then, that the instrument in question is the act or deed of the corporation, but it affirmatively appears that it was executed in pursuance of a resolution that conferred no authority whatever to perform a corporate act; for the plaintiffs themselves introduced in evidence the authority under which they claimed the act to have been performed, and upon which they relied. Having done this, we are not at liberty to indulge the presumption that the parties executing the deed on behalf of the corporation were otherwise duly authorized. The authority acted upon is affirmatively shown, and this fails. We think the deed properly excluded. But even if it had been admitted without further proof of the authority of the parties to execute it, it would not have availed the plaintiffs. As there does not appear to have been any authority in the parties assuming to act, to sell or convey at all, it is unnecessary to discuss the other questions.

Rule.

Judgment affirmed.

Mr. Justice RHODES did not express an opinion.

By the Court, SAWYER, J., on petition for rehearing:

"The consequences assumed as the only basis of the argument in the petition for rehearing do not follow from anything determined or in any way suggested in the opinion in this case. We have nowhere held, or even intimated, that the Board of Trustees of a corporation can convey all the property of the corporation necessary to enable it to carry on the business for which it was organized, or do anything else destructive of the objects of its creation without the consent of its stockholders. We have not even held that it was competent for the Trustees, acting as a Board, to authorize the conveyance of the property now in question without the consent of the stockholders. There was no such question in the case. We simply held that the stockholders themselves could not authorize the Trustees, acting as individual Trustees, or anybody else, to convey it—that nobody could convey it unless authorized by some act of the Board of Trustees, acting as a Board. It may be conceded for the purposes of this case that the Board of Trustees itself could not authorize a convey-



ance of the property in question without the consent of the stockholders. But it is unnecessary to consider that question, for the case does not present or even suggest it. It will be time enough to decide that question when it arises.

Rehearing denied. *Dec 477 of 383, 398-399. 404, 415 441-443*  
 $\frac{475-477}{475-477} \quad 296-298$

C. 2239

COMMONWEALTH v. BRINGHURST.

1883. 103 Pa. State, 184.<sup>1</sup>

ERROR to Court of Common Pleas, No. 2, of Philadelphia County  
*Quo warranto* by the Commonwealth of Pennsylvania, *ex relatione*  
 John P. Verree *et als.*, against Bringhurst *et als.* to determine the right  
 of the defendants to hold the office of directors of the Philadelphia  
 Iron and Steel Company, a corporation chartered by special Act of  
 April 12, 1867 (P. L. 1211).

The suggestion of the relators set forth, in substance, that at the  
 annual meeting certain votes by proxy were received by the inspectors  
 of election under protest; that the inspectors refused to count any  
 of the votes thus given by proxy; that the defendants, who had re-  
 ceived a majority of the votes given by stockholders in person, were de-  
 clared elected directors; whereas if the votes given by proxy had been  
counted together with the votes given in person the relators were  
 elected.

Defendants demurred.

The court below sustained the demurrer and entered judgment for  
 defendants.

*R. C. Dale* and *Samuel Dickson*, for plaintiffs in error. The rule of  
 the common law, established when municipal, religious, and charitable  
 corporations were alone known, has no application to trading or monied  
 corporations where the relation of the members is not personal. In the  
 former, the units are persons, in the latter the units are shares. *State*  
*v. Tudor*, 5 Day, 329. The case of *Taylor v. Griswold* (2 Green,  
 N. J. 223) manifests a narrow adherence to common-law doctrines,  
 and the other cases cited on the other side are not authorities. *Philips*  
*v. Wickham* (1 Paige, 590, 598) was the case of a quasi municipal  
 corporation. *Brown v. Commonwealth* (3 Grant, 209) was decided on  
 an express limitation in the charter, and *Craig v. Church* (7 Norris, 42)  
 was the case of a religious society. An examination of the general  
 legislation of this State shows that the legislature regarded the right  
 of shareholders to vote by proxy as an inherent right without special  
 enactment [citing various Acts]. In all business transactions what one  
 does by another he does himself, and what he can do himself he can do  
 by another. Story on Agency, § 3. If a vote cannot be given by  
 proxy, the Guarantee Trust Company, which is the largest holder of

<sup>1</sup> Statement abridged. Part of argument omitted. — Ed.

this stock, is disfranchised, for a corporation can only act through an agent.

*George R. Van Dusen* and *W. Heyward Drayton*, for defendants in error.

[Argument omitted.]

MERCUR, C. J. The relators are stockholders of the Philadelphia Iron and Steel Company. It was incorporated by special Act of 12th of April, 1867.

The contention is, whether the stockholders may vote by proxy, in the annual election of officers of the corporation? ||

Section 2 of the Act declares "the affairs of said company shall be managed by a board of five directors, one of whom shall be the president, who shall be chosen by the stockholders. All elections shall be by ballot, and every share of stock upon which the required instalments have been paid, shall entitle the holder thereof to one vote." Section 3, inter alia, authorizes the corporation to "make all needful rules, regulations, and by-laws for the well ordering and proper conduct of the business and affairs of the corporation. Provided the same in no wise conflict with the constitution and laws of this State or of the United States."

The charter in no wise refers to voting by proxy. No by-law has been adopted authorizing the stockholders to so vote.

In the absence of any express authority in the charter, and without any by-law authorizing it, the question is whether the stockholders may vote by proxy. In other words, is it a power necessarily incident to the corporate rights of the stockholders?

A corporation is the mere creature of the law. It cannot exercise any power or authority other than those expressly given by its charter, or those necessarily incident to the power and authority thus granted, and therefore, in estimation of law, part of the same. *Wolf v. Goddard*, 9 Watts, 550; *Diligent Fire Co. v. Commonwealth*, 25 P. F. Smith, 291.

The right of voting at an election of an incorporated company by proxy is not a general right. The party who claims it must show a special authority for that purpose. *Angell & Ames on Corporations*, § 128; *Philips v. Wickham*, 1 Paige's Cases in Chancery, 590. In this case, Chancellor WALWORTH says, the only case in which it is allowable at the common law is by the peers of England, and that is said to be in virtue of a special permission of the King. He adds: "It is possible that it might be delegated in some cases by by-laws of a corporation, where express authority was given to make such by-laws, regulating the manner of voting." In the *People v. Twaddell*, 18 Hun, 427, it was held, a stockholder cannot so vote unless expressly authorized by the charter or by-laws. *Taylor v. Griswold*, 2 Green (N. J.) 222, holds that a right of voting by proxy is not essential to the attainment and design of a charter, and even a general clause therein authorizing the company to make by-laws for its government was insufficient of itself

to give that right. In *State v. Tudor*, 5 Day (Conn.), 329, there was no clause in the charter authorizing the stockholders to vote by proxy; yet the company made a by-law authorizing them to so vote. The validity of this by-law was sustained by a majority of the court. So in *People v. Crossley*, 69 Ill. 195, effect was given to a by-law of the corporation, authorizing voting by proxy, the by-law not being in conflict with the Constitution and laws of the State.

That a right to vote by proxy is not a common-law right, and therefore not necessarily incident to the shareholders in a corporation, appears to have been recognized in *Brown v. Commonwealth*, 3 Grant, 209, and in *Craig v. First Presbyterian Church*, 7 Norris, 42.

The selection of officers to manage the affairs of this corporation requires the exercise of judgment and discretion. They must be elected by ballot. The fact that it is a business corporation in no wise dispenses with the obligation of all the members to assemble together, unless otherwise provided, for the exercise of a right to participate in the election of their officers. Although it be designated as a private corporation, yet it acquired its rights from legislative power, and it must transact its business in subordination to that power. As then the relators cannot point to any language in the charter expressly giving a right to vote by proxy, and it is not authorized by any by-law, they have no foundation on which to rest their claim. Judgment was correctly entered for the defendants on the demurrer.

Dec. 198 of 191. 288

Judgment affirmed.

Const. Art. XII § 12. C C C 303(3) 307. 3216.

## JO HORNE v. IVY.

20 Car. 2. 1 Modern, 18.

TRESPASS for taking away a ship. The defendant justifies as servant under the patent whereby *The Canary Company* is incorporated, and whereby it is granted, "That none but such and such should trade thither, on pain of forfeiting their ships and goods, etc.," and says, that the defendant did trade thither, etc. The defendant demurs.

*Pollexfen* for the plaintiff contended, that the defendant ought to have shewn the deed whereby he was authorized by the Company to seize the goods;<sup>1</sup> though he agreed, that for ordinary employments and services a corporation may appoint a servant without deed, as a cook, a butler, etc.<sup>2</sup> A corporation cannot license a stranger to fell trees without deed.<sup>3</sup> Nor can they make a disseisor without deed, nor deliver a letter of attorney without deed.<sup>4</sup> Secondly, The plea is

<sup>1</sup> 26 Hen. 6. pl. 8. 14 Edw. 4. pl. 8. Bro. "Corporation," 59.

<sup>2</sup> Plowd. 95.

<sup>3</sup> 12 Hen. 4. pl. 17.

<sup>4</sup> 9 Edw. 4. pl. 59. Bro. "Corporation," 24. 34. 14 Hen. 7. pl. 1. 7 Hen. 7. pl. 9. 1 Roll. Abr.

double; for the defendant alleges two causes of a breach of their charter, *viz.* their taking in wines at *the Canaries*, and importing them here; which is double. Then there is a clause that gives the forfeiture of goods and imprisonment, which cannot be by patent.<sup>1</sup> This patent I take also to be contrary to some acts of parliament, *viz.* 2 Edw. 3. c. 1. 2 Edw. 3. c. 2. 2 Rich. 2. c. 1. 11 Rich. 2. c. 2; and these statutes the king cannot dispense withal by a *non obstante*.

TWISDEN, Justice. For the first point, I think, they cannot seize without deed, no more than they can enter for a condition broken without deed.

KELYNGE, Chief Justice. We desire to be satisfied, whether this is a *monopoly* or not? — It was ordered to be argued again.<sup>2</sup>

*N. C. 28/10/30 4, 397, 398, 403. 423.*

# SHERMAN v. FITCH.

1867. 98 *Massachusetts*, 59.<sup>3</sup>

BILL IN EQUITY by assignees of the Northampton Street Sugar Refinery, an insolvent corporation, praying for a decree that a recorded mortgage of personal property, held forth by the respondent as having been made to him by the corporation, might be declared void. The mortgage (dated January 19, 1865) purported, by the language of the grant, covenants, and condition, to be the mortgage of the corporation. It was signed "George R. Sampson, President of Northampton Street Sugar Refinery." [Seal.]

After a demurrer had been overruled, the respondent filed an answer putting in issue the validity of the mortgage as a mortgage of the corporation. The case was reserved for determination by the full court on agreed facts, which were, in part, as follows: —

For some time prior to January 19, 1865, the respondent had been, and then was, selling agent of the corporation, which owed him about eighteen thousand dollars, to secure the payment of which by the corporation, George R. Sampson, who was president and a director, and

<sup>1</sup> 8 Co. 125. Noy, 123.

<sup>2</sup> It appears in Keble and Ventris, that judgment was given in this case for the plaintiff, on the first objection, because the defendant justified by the command of a *corporation*, without showing that his authority to seize the ship was by a *deed*; and S. C. Siderfin says, that the court also held the bar bad in substance, because the king by his *patent* cannot create a *forfeiture* for the doing those things which his patent prohibits. See 3 Peer. Wms. 424. Hardres, 55. Skinner, 135, 224. 8 Co. 125. Palmer, 5. 3 Lev. 353. 1 Salk. 32. 5 Com. Dig. "Trade," (B.). 1 Burr. 526. 1 Term Rep. 118.

<sup>3</sup> Only so much of the case is given as relates to a single point. — Ed.

was also manager of the manufacturing department, executed and delivered to him the instrument in question. At that date there were four directors (who were the principal stockholders): Sampson; his son; a nephew; and one Tappan, who was in Europe. That was the full number of the board required by the by-laws, which also provided that "the board of directors shall manage and control the business, property, and affairs of the corporation." The records of the corporation contained no express vote of either directors or stockholders authorizing the execution and delivery to the respondent of a mortgage on the corporate property; but the execution and delivery of the instrument was known to all the directors except Tappan, at the time thereof, "and was approved by them, provided their neglect to make any objection to the same can be construed as an approval."

*C. H. Drew*, for complainants [argument omitted].

*D. P. Kimball*, for respondent.

WELLS, J. [The court *held*, that the mortgage was, upon its face, the mortgage of the corporation, and not the individual contract of Sampson. The court then said:]

The remaining consideration relates to the authority of Sampson to execute the mortgage in behalf of the corporation. It is not necessary that the authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, + with the knowledge and concurrence of the directors, or with their subsequent and long-continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals. *Emmons v. Providence Hat Manufacturing Co.*, 12 Mass. 237; *Milledge v. Boston Iron Co.*, 5 Cush. 158; *Lester v. Webb*, 1 Allen, 34. The absence of one of the directors in Europe could not deprive the corporation of the capacity to act and bind itself by the acts of the officers in actual charge of its affairs.

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(B) *Torts, Crimes, and Unauthorized Contracts.*

Dec 4 88.

CHESNUT HILL, &c., TURNPIKE CO. v. RUTTER.

Trespass.

1818. 4 *Sergeant & Rawle* (Pa.), 6.

IN ERROR.

This was an action of trespass on the case [brought by Rutter against the Turnpike Co.], in the Common Pleas of *Montgomery* County, for stopping a water course.

2nd. Chanf. corp. v. R. v. 100 2nd. 1818

The declaration stated, that the defendants below, the plaintiffs in error, were incorporated by an act of assembly, passed on the 5th day of *March*, 1804, entitled, "an act to enable the Governor of this Commonwealth, to incorporate a company to make an artificial road, from the top of *Chestnut Hill*, through *Flourtown*, to the *Spring House* tavern, in *Montgomery* county;" that the plaintiff was seized of a messuage, tanyard, and tract of land, through which a rivulet from time immemorial, had flowed, &c.; and that the defendants *contriving, and wrongfully, and injuriously intending to injure* the said plaintiff, and to deprive him of the benefit of working and tanning leather, in the said tanyard, and of the profit that might accrue therefrom, *did wrongfully and unjustly erect and set up, certain jetties or piers*, on each side of the said rivulet, by reason whereof, the said rivulet was thrown back, and overflowed the said tanyard, and destroyed a great quantity of hides, &c.

By the 9th section of the act of incorporation,<sup>1</sup> the company had power "to erect permanent bridges over all the waters crossing the said road."

The jury found a verdict in favour of the plaintiff, for 305 dollars.

The errors now assigned were, 1. That the Court below permitted an action to be maintained against a body corporate for a tort.

2. That the declaration, if such an action could be maintained, set forth no cause of action.

*E. Ingersoll and Ingersoll*, for plaintiffs in error.

[After discussing the history of actions:]

It was never, however, pretended, that an action of trespass *vi et armis*, would lie against a corporation, which, from its nature, is incapable of committing a tort; nor can the same thing in effect be done, by changing the form of action, and calling it an action on the case. Corporations can no more be guilty of torts than executors; the analogy between them, in this respect, is strong, and it has been decided, that trover does not lie against an executor for a conversion by his testator. *Hambly v. Trott*.<sup>2</sup> Indeed, it was once doubted, whether *assumpsit* would lie against a corporate body, because it could make no promise without affixing its seal, and the Supreme Court of this State, went so far on one occasion as to decide, that it would not. *Breckbill v. Turnpike Company*.<sup>3</sup> The remedy for a tort is not against the corporation, but against the individual who commits it, who may have his action over against those who employed him. The relation of master and servant, as it exists between individuals, does not hold between corporations and those who act under their orders. *Kyd on Corp.* 223, 260, 450. If the servant of a corporation commit an assault and battery, it will not be pretended, that the corporation is responsible. If it be not responsible for an assault

<sup>1</sup> Pamph. L. 215.

<sup>2</sup> Cowp. 372.

<sup>3</sup> 3 Dall. 496.

and battery committed by its servant, the relation of master and servant does not exist; because nothing is more clear than that a master is responsible for the torts of his servant, committed in the course of his master's business. How can a distinction be drawn between an assault and battery, and injuries of the nature of that complained of in this suit? It is impossible to say where the line should be placed.

Corporations are the creatures of the law, of a highly refined and intangible nature, whose properties and attributes, lawyers alone can understand. Deriving their existence from the law, they must be governed by the terms of the law which creates them. They must proceed and be pursued in the path prescribed by the law. If the corporators do an act, beyond their corporate powers, they, as individuals, and not the corporation of which they are members, must answer it. If the corporation itself enter into a contract not authorised by its charter, no action founded on the contract can be sustained, though the individual members may be sued. Suppose an insurance company should undertake to make a turnpike road, or to build a church, could those who were employed by them, recover against the corporation as such? Every principle of the law of corporations forbids it. Now, a corporation never was and never can be authorised by law to commit a tort; they can invest no one with power for that purpose. If, therefore, an agent constituted for a legal purpose, inflict an injury, the corporation is no more answerable, than it would be for an act of that agent, done without any authority whatever derived from it, because being unauthorised to commit a wrong, it is out of the scope of its corporate powers. The act of the law, like the act of God, can work a wrong to no one, and if a man sustain damage by it, it is *damnum absque injuria*. The plaintiff in this case, therefore, must look to the individual from whose acts he sustained an injury, who never was, and never could be authorised to commit a tort. The principle that a body corporate can only act in strict pursuance of the objects of its incorporation, is stated and exemplified in the conclusion of the Lord Chancellor's opinion, in the case of *Child v. Hudson's Bay Company*.<sup>1</sup> It is also established by the cases of *Beatty v. Marine Insurance Company*,<sup>2</sup> and *Head v. Providence Insurance Company*,<sup>3</sup> *Steele v. President &c. of Lock Navigation*,<sup>4</sup> *M'Clennahan v. Curwen*.<sup>5</sup>

Between *nonfeasance* and *malfeasance*, a marked distinction exists. It is not denied, that for *nonfeasance*, actions of trespass on the case have been sustained, as in the case of the *Mayor of Lynn (in error) v. Turner*,<sup>6</sup> where the action was against the corporation of *Lynn Regis*, for neglect of duty, in not keeping a creek in repair; in the case of *Townsend v. Susquehannah Company*,<sup>7</sup> for neglecting to repair a

<sup>1</sup> 2 P. Wms. 209.

<sup>2</sup> 2 Johns. 114.

<sup>3</sup> 2 Cranch, 166.

<sup>4</sup> 2 Johns. 283.

<sup>5</sup> 6 Binn. 509.

<sup>6</sup> Cowp. 86.

<sup>7</sup> 6 Johns. 90.

bridge, and in several similar cases. *Gray v. Portland Bank*,<sup>1</sup> *Stephens v. Middleton Canal*.<sup>2</sup> In *Riddle v. Proprietors of locks and canals on the Merrimac*,<sup>3</sup> PARSONS C. J. lays down the law more broadly than by his authorities he is warranted in doing, yet he does not go so far as to assert the general proposition, that trespass will lie against a corporation. He merely says, that in *certain* cases, trespass may be maintained; and it is to be observed, that the action in which the opinion was delivered, was for a *nonfeasance*; a neglect of a corporate duty in not keeping the canal in order.

On recurring to ancient authorities, it will appear, that trespass against a corporation for a *tort*, has never been sustained. THORPE J. in the *Book of Assizes*, 22 *Edw.* 3. p. 100. expressly says, that trespass never lies against a corporation. A corporation and an individual cannot be joined in trespass as defendants. 8 *H.* 6. 1. *pl.* 2. A corporation cannot commit a disseisin except for its own use. *Mich.* 8 *H.* 6. *pl.* 34. p. 14. *Mich.* 9. *H.* 6. *pl.* 9. p. 36. *Hil.* 22. *H.* 6. *pl.* 36. p. 46. Trespass does not lie against a corporation in its corporate name. *Vin. Corp.* *pl.* 15. p. 300. Nor will an attachment lie. *Id.* *B.* *A.* *pl.* 3. p. 311. Nor replevin. *Id.* *X.* *pl.* 17. p. 308. In trespass against an abbot he shall be named by his name of baptism. *Id.* *Q.* *pl.* 9. p. 300. An action for a false return to a *mandamus*, must be against the individual members of the corporation. *Id.* *Q.* *pl.* 50. p. 308. A corporation cannot beat or be beaten. *Id.* *Z.* *pl.* 2. p. 309. If a corporation disseise, it is in their natural and not in their corporate capacity. *Bac. Ab. Corp. E.* *pl.* 5. Trespass does not lie against a corporation. *Com. Dig. Plead.* 2. *B.* p. 196.

2. If the plaintiffs in error, be capable of inflicting the injury imputed to them, the declaration sets forth no cause of action.

[The argument on this point is omitted.]

*Binney*, for the defendant in error. This case presents three questions. 1. Whether a corporation can commit a tort? 2. Whether, if it can, this is the proper form of action? 3. Whether the cause of action is well set forth?

It must now be taken as proved, that the company gave authority to their servants to do the act complained of. The rule between corporations and their servants, is substantially the same, as between individuals and their servants. If, therefore, they give their servants power to do an act in pursuance of their corporate character, and they do it improperly, the corporation are responsible in the same manner as any other master. Why should a difference exist, and why should a corporate body be protected in the commission of wrong? If a corporation be the intangible being it is asserted to be, a greater and more mischievous monster cannot be imagined. According to the doctrine contended for, if they do an act within the scope of their corporate powers, it is legal, and they are not answerable for the con-

<sup>1</sup> 3 Mass. R. 364.

<sup>2</sup> 12 Mass. R. 466.

<sup>3</sup> 7 Mass. R. 169.



sequences. If the act be not within the range of their legitimate powers, they had no right by law to do it; it was not one of the objects for which they were incorporated, and, therefore, it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any Court of justice. The master is responsible for the acts of the servant, not because he has given him an authority to do an illegal act, but from the relation subsisting between them. If the servant exceed the power he has received, the master must answer it. So if the company give their servant authority to make a road, in pursuance of their power to do so, and he exceed that authority, they are answerable, because he is their servant. The rule which makes the master responsible for the acts of the servant, is declared by SEDGWICK J. in delivering the opinion of the Court, in the case of *Gray v. Portland Bank*,<sup>1</sup> to apply with peculiar force to corporations and their agents. The position that a corporation can do no wrong, is pernicious in its consequences, and unfounded in law. If I put a note in bank, and wish to get it out, to put it in suit, and the bank refuse to deliver it, surely the remedy is an action of trover. If I refuse an exorbitant toll, in consequence of which, my horse is taken from me, and I cannot get him from the toll gatherer, can it be doubted, that I may have an action of trover against the company? If I cannot look to the company, there is no remedy, because the toll gatherer may be worth nothing, or may have gone off; nor can the individual members be resorted to unless they were guilty of malice. If a quagmire or any other nuisance exist, the supervisors where there is no turnpike company may be indicted; and where a company are invested with the duties of supervisors, they may be indicted. The corporators as individuals cannot be indicted, because it is not within the line of their duty as such.

As to the form of action, it is difficult to point out any other remedy for injuries of this description than trespass on the case, and if there be no other remedy, this is the right one. *Assumpsit* certainly would not lie, because there was no contract; nor would trespass *vi et armis*, because the damage was consequential. The old authorities which have been referred to, belong to a period, when the English lawyers were more distinguished for subtlety than for sound sense; and when the nature of corporations was greatly refined upon. It appears, however, from 2 *Inst.* 697. 703, that a corporation was then considered as substantially an inhabitant or occupier; and subsequently in *Rez v. Gardener*,<sup>2</sup> it was held, that a corporation seized of land for their own profit in fee, are, within the statute of 43 *El.* c. 2, inhabitants or occupiers of such lands, and liable in respect thereof, to be rated in their corporate capacity to the poor. In the Supreme Court of the *United States*, it has been decided, that a corporation may sue in the Circuit Court of the *United States* as a citizen. *Deveau v. Bank of*

<sup>1</sup> 2 Mass. R. 385.

<sup>2</sup> Cowp. 79.

*United States.*<sup>1</sup> The law on the subject of corporations has of late been greatly and beneficially altered. It was formerly held, that they could do nothing except under their seal, and for that reason *assumpsit* would not lie against them. All these niceties, however, are now repudiated, and they may enter into contracts either express or implied, without seal. When a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorised agents, are *express* promises by the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise *implied* promises, on which an action lies. *Bank of Columbia v. Patterson's administrators.*<sup>2</sup>

The opinion of THORPE J. which is much relied on, was nothing more than a *dictum*, and was grounded upon the necessity which then existed of a *capiatur pro fine* and *exigent*, which could not be entered against a corporation. These, however, are now exploded, and giving to the assertion of THORPE, all the weight to which it can possibly be entitled, the authority must fail, because the reason of it no longer exists. The distinction taken between a *misfeasance* and a *non-feasance* is altogether ideal; it has no solid foundation. The authorities all shew, that the action will lie in either case. If a company be guilty of a *tort* by neglecting a road or bridge, how can they be reached but in this form of action? That this is the proper form, is proved by the cases adduced on the opposite side. The *Mayor of Lynn v. Turner*, was clearly an action of trespass on the case, for a *tort*; so was *Townsend v. Susquehanna Turnpike Company*, and *Riddle v. Proprietors of Locks, &c. on Merrimack*. In two of these cases the point was not made, and in the third, it was overruled. As respects the form of action, there is no difference between *nonfeasance* and *misfeasance*; trespass on the case, is the general form. We are, therefore, brought back to the point from which we set out, whether a corporation can commit a *misfeasance*, which is clearly proved, not only by the late, but by the ancient authorities, and even by some of those which have been cited for the plaintiffs in error. *Trespass against the Mayor and Commonalty of York*; plea that all the inhabitants had right of common, in the place where the trespass, &c.; not good, because the action is against the corporation, and the plea is a justification as to individuals. Plea altered, and the corporation said to be aiding in the trespass; adjudged that they cannot be aiding, *nor can they give a warrant to commit a trespass without writing.* 4 H. 7. pl. 11. p. 13. A corporation cannot authorise a wrong to be committed, *except by writing under their common seal.* *Brook. Corp.* pl. 34. p. 189. These authorities prove the *capacity* of a corporate body to commit a wrong, and shew the position said to have been laid down by THORPE, to be erroneous. *Trespass against the Mayor, Bailiffs, and Commonalty of Ipswich, and one Jabez.* Objection was taken, that a

<sup>1</sup> 5 Cranch, 65.

<sup>2</sup> 7 Cranch, 299.

\* *Adams v. Lister* p. 60. n The difficulty felt in earlier times was purely one of *form*; in a corp. no metaphysically incapable of doing wrong but it was *not* physically capable of amenable to capias or exigent of note to a than p. 452

corporation and an individual cannot be joined in one writ, but no objection taken, to trespass having been brought against a corporation. 8 H. 6. pl. 2. p. 1. *Id.* pl. 34. p. 14. An assize of *novel disseisin* was maintained against the mayor and commonalty of *Winton*. *Lib. Ass.* 81. *Ass. pl.* 19. In trespass against a corporation, if defendant plead a *misnomer*, plaintiff may reply, known by one name or the other. 6 Vin. pl. 42. p. 303. The result of these authorities is, that even in ancient times, trespass could be sustained against a body corporate.

[Omitting argument as to sufficiency of declaration.]

TILGHMAN C. J. This is an action on the case, brought by *James Rutter* against *The Chestnut Hill & Spring House Turnpike Company*, for an injury done to the plaintiff's land and tanyard, in consequence of certain piers erected by the defendants, on each side of a stream of water, by which the stream was obstructed and thrown back, and overflowed the plaintiff's land.

The defendants below, who are plaintiffs in error, rely on two objections. 1. That a corporation is not suable in this kind of action. 2. That the declaration does not state a good cause of action, even if the defendants were liable to an action in this form.

1. Corporations have lately been so multiplied in the *United States*, that they stand a very prominent part, in the business of the country. It has, therefore, been necessary to consider with great attention, their nature, and their rights, both as to suing and being sued. And as it would be extremely inconvenient, that they should do wrong without being amenable to justice, the inclination of the Court has been to hold them responsible. There was a time, when it seems to have been supposed, that they could make no contract, but by writing under their common seal. The reason assigned was, that being incorporeal, and consequently incapable of speaking, it was impossible that they should enter into a parol contract. But upon reflection, this reason has been thought insufficient; for if pursued to its full extent, it would prove, that a corporation could not act at all. It has no hand to affix a seal, and must therefore employ an agent for the purpose. But this agent must receive his authority previous to his affixing the seal. It is necessary, therefore, that the corporation should have the power to act without seal, so far as respects the appointment of a person to affix the seal. Now if it can appoint an agent without seal, for one purpose, there is no reason why it may not for another. Accordingly, in the case of *The King v. Biggs*, 3 P. Wms. 419, on a special verdict in a case of capital felony, it was held, that the *Bank of England* might without seal, authorise a person to sign notes in its behalf. And it was decided by the Supreme Court of the *United States*, in the case of *The Bank of Columbia v. Patterson's administrators*, 7 Cranch, 299, that a corporation may, without seal, enter into a contract, express, or even implied. In the words of Judge STORR, by whom the opinion of the Court was delivered, "when a corporation is acting within the

scope of the legitimate purpose of its institution, all parol contracts made by its authorised agents, are *express* promises of the corporation, and all duties imposed on them by law, and all benefits conferred, at their request, raise *implied* promises, for which an action lies." By this decision, I consider the law as settled. It does, indeed, seem to have been the opinion of *this Court*, in the case of *Breckbill v. The Lancaster Turnpike Company*, 3 *Dall.* 496, that an action of *assumpsit* would not lie against a corporation. But the law had not been at that time fully considered, and I may say, that our late brother YEATES, who was on the bench when *Breckbill v. The Lancaster Turnpike Company* was decided, was satisfied as to the propriety of acquiescing in the authority of *The Bank of Columbia v. Patterson's administrators*.

But it is objected that the present action is not on *contract* but on *tort*, and a very refined argument is brought forward, to prove that a corporation cannot be guilty of a tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorised by its charter. But the charter does not authorise it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles, and mischievous in its consequences, as it tends to introduce actual wrongs and illegal remedies; for a turnpike company may do great injury, by means of labourers who have no property to answer the damages recovered against them. It is much more reasonable to say, that when a corporation is authorised by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible, in the same manner that an individual is responsible for the actions of his servants, touching his business. The act of the agent is the act of the principal. There is no solid ground for a distinction between contracts and torts. Indeed, with respect to torts, the opinion of the Courts seems to have been more uniform than with respect to contracts. For it may be shewn, that from the earliest times to the present, corporations have been held liable for torts. Many cases have been cited from the year books. Upon examination, they do not all answer the citations, but enough appears to shew that the law was so understood. In 4 *Hen.* 7. p. 13. *pl.* 11, we find an action of trespass against the Mayor and Commonalty of *York*. Plea, that all the inhabitants had a right of common in the land where the trespass is supposed to have been committed: *held*, not good, because the action is against the corporation, and the plea is a justification as to *individuals*. In a subsequent part of this case, it is said that a corporation cannot give a warrant to commit a trespass *without writing*. This, if it be law, proves that a warrant may be given by writing, which is sufficient for the plaintiff's purpose, the point being, whether a corporation can commit a trespass. In 8 *Hen.* 6. p. 1. *pl.* 11. and p. 14. *pl.* 34, trespass was brought against the Mayor and Bailiffs, and Commonalty of *Ipswich*, and one *J. Jabez*. It was objected, that a corporation and an

individual cannot be joined in one action ; but it was not objected that trespass does not lie against a corporation ; and the objection is said to have been overruled in 14 *Hen.* 8. 2. In the book of assises (31. *Ass. pl.* 19.) it appears that an assise of novel disseisin was maintained against the Mayor and Commonalty of *Winton*. *Brook* lays it down, that if the Mayor and Commonalty disseise one who releases to several *individuals* of the corporation, this will not serve the Mayor and Commonalty, because the disseisin is in their *corporate* capacity. In the old books of entries are numerous precedents of writs of *quare impedit* against corporations, and in *Vidian's Ent.* 1. is a declaration in an action on the case (16 *Car.* 2.), against the Mayor and Commonalty of the city of *Canterbury*, for a false return to a *mandamus*. To come to more modern times, it was held in the Mayor of *Lynn, &c.* (in error,) v. *Turner*, (*Cowp.* 86,) that an action on the case lies against a corporation for not cleansing, and keeping in repair, a stream of navigable water, which it was bound to do by prescription, in consequence of which the plaintiff was injured. This was in the year 1774, a little before our revolution. The laws of the Commonwealth forbid my tracing this point through the English Courts, since the revolution, but we shall find abundant authority in the Courts of our own country. In *Gray v. The Portland Bank*, 6 *Mass. Rep.* 364, it is laid down, that the bank was responsible for wrongs done by itself or its agents. In *Riddle v. The Proprietors of the Locks, &c. on Merrimack river*. 7 *Mass. Rep.* 169, an action was maintained against the company for damage suffered by the plaintiff in consequence of the locks not being kept in repair. And in *Townsend v. The Susquehanna Turnpike Company* (6 *Johns.* 91,) an action was supported for the loss of a horse, killed by the falling of a bridge, which the company had built of bad materials. These authorities put it beyond doubt, that the form of action, in the present case, is good.

The objection to the declaration remains to be considered. It is said, that the act of assembly, by which this company is chartered, gives them power to erect bridges over all the streams which cross the road, and, therefore, they are not responsible for any damages which may be suffered in consequence of these bridges. But this is too broad a proposition : for, granting that they would not be responsible for damages unavoidably resulting from a bridge built in the best manner, and obstructing the passage of the water, no more than was necessary for its proper construction, it would not follow that they should not be answerable for damages arising from a bridge so carelessly or inartificially built, as to occasion an unnecessary and wanton obstruction. Now, the declaration alleges, that the defendants contriving, and wrongfully and injuriously intending to injure the plaintiff, &c. *did wrongfully and unjustly set up certain piers, &c.* So that we are bound, after verdict, to suppose that it was proved the defendants were in fault, in the manner of erecting the piers. To say, now, that they were guilty of no wrong, would be to declare that it is impossible for

them to be made answerable for *any injury which may arise from any kind of bridge or piers*. This is going farther than I can permit myself to do, being satisfied that the law never intended to authorise damage without necessity.

Judgment affirmed.

NAC 488 - 492

**GREEN v. LONDON GENERAL OMNIBUS CO. (LIMITED).**

1859. 7 Common Bench, New Series, 290.1

*Wrongful & malicious obstruct omnibuses*

ACTION against the defendants for wrongfully and maliciously obstructing the plaintiff in his business of an omnibus proprietor.

The declaration, in substance, alleged that defendants, contriving and intending to injure and ruin the plaintiff and to prevent him from carrying on his business, wrongfully, vexatiously, and maliciously placed and drove their omnibuses just before and just behind the plaintiff's omnibuses while plying for hire on the streets, so as to prevent persons from becoming passengers in the plaintiff's omnibuses; also that defendants, with the same intent, etc., drove their omnibuses against the omnibuses and horses of the plaintiff so as to damage the same and to prevent the access of passengers into the plaintiff's omnibuses; also that defendants, with the same intent, etc., caused their servants to place themselves so as to prevent persons from entering plaintiff's omnibuses; also that defendants, with the same intent, etc., hissed, assaulted and beat plaintiff's servants while employed in driving the said omnibuses; also that defendants, with the same intent, etc., caused their omnibuses to precede and follow plaintiff's omnibuses in such a manner as to cause an obstruction to the highway at certain points where plaintiff's omnibuses would, if there were no obstruction, be permitted to wait for a certain space of time to look for passengers: by reason of which said grievances great numbers of persons were prevented from becoming passengers in plaintiff's omnibuses, and plaintiff's omnibuses and horses were injured, and plaintiff was damaged, hindered and obstructed in carrying on his business.

To this declaration the defendants demurred; and the plaintiff joined in demurrer.

*Giffard* (with whom was *Paterson*), in support of the demurrer. — The declaration alleges a variety of malicious acts done by the company with the intention of obstructing and injuring the plaintiff in carrying on his trade. Now, the gist of the action is the malicious intention; and a corporation cannot as such be actuated by malice. A corporation, according to Lord Coke, — *Sutton's Hospital Case*, 10 Co. Rep. 32 b, — "cannot treason, nor be outlawed, nor excommunicate, for they have no souls; neither can they appear in person, but by attorney; 33 H. 8, Br. Fealty. A corporation aggregate of many cannot do fealty, for, an invisible body can neither be in person, nor swear: *Plowd. Comm.* 213, and the *Lord Berkeley's Case*, 245: it is not subject to imbecilities, death of the natural body, and divers others cases."

<sup>1</sup> Statement abridged. — Ed.

The question is how far the old rule of law in this respect is modified by the recent decisions upon the subject. The most recent authority on the point is that of *Whitfield v. The South Eastern Railway Company*, 1 Ellis, B. & E. 115 (E. C. L. R. vol. 96), where it was held that a count against a railway company, being a corporation aggregate, for a malicious libel, is good on demurrer; for that a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice *in law* sufficient to support the action. But there the judgment proceeded upon the ground that the occasion did not justify the publication, and therefore the law would infer malice.

[After distinguishing *Eastern, &c., R. Co. v. Broom*, 6 Exch. 814, the argument proceeds:]

All the acts that are here attributed to the company are acts which are necessarily *malicious*. The plaintiff must show that he has been injured by the defendants' placing their omnibuses before and behind his *maliciously*. Apart from malice, there is no cause of action. The company in its corporate capacity could not authorize acts which are necessarily unlawful and malicious. The mere obstruction by the defendants of the plaintiff's enjoyment of a public way gives no ground of action: he must show a private and particular damage from an act of the defendants which is intentionally malicious or unlawful: *Hubert v. Groves*, 1 Esp. N. P. C. 148; *Rose v. Miles*, 4 M. & Selw. 101; *Wilks v. The Hungerford Market Company*, 2 N. C. 281 (E. C. L. R. vol. 29), 2 Scott 446 (E. C. L. R. vol. 30). Here, the plaintiff has suffered no grievance which is peculiar to himself. [BYLES, J.—What is the meaning of *maliciously*? ERLE, C. J.—A wilful violation of the law producing damage to an individual, must be presumed to be malicious.] To sustain this declaration, the plaintiff must show some wilful and unlawful and unauthorized interference by the defendants with some private right. [*Grant*, *Amicus Curie*, referred to the *Quo warranto* in *Rex v. The City of London*, 8 Howell's State Trials 1039, 1305, 1309, where the subject of malice in a corporation is much discussed. CROWDER, J.—Would this declaration be bad without the allegation of malice? Does the allegation mean anything more than wilful?] It is submitted that the whole gist of the action is the malice. The defendants could not justify the specific acts charged without justifying the malicious intention: *Gregory v. The Duke of Brunswick*, 6 M. & G. 205 (E. C. L. R. vol. 46), 6 Scott N. R. 809.

*F. Edwards*, *contra*. [Argument omitted.]

*Giffard*, in reply. [Argument omitted.]

*Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:—

We are of opinion that our judgment in this case ought to be for the plaintiff. This is an action against the defendants for wrongfully, vexatiously, and maliciously interfering with the plaintiff's rights, by causing their vehicles to be driven in such a manner as to obstruct and

molest the plaintiff in the use of the highway. The declaration alleges various grievances of that general character. To this declaration there is a demurrer raising for our decision the question whether the action will lie. The ground of the demurrer is that the declaration charges a wilful and intentional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie. But the whole of the acts that are charged against the defendants are acts connected with driving vehicles; and the defendants are a company incorporated for the purpose of driving omnibuses, and therefore the acts alleged to have been done by them are all acts which are within the scope and object of their formation. Unless the acts charged were wrongfully done, the plaintiff of course would have no ground of complaint. We are clearly of opinion that the action lies: and there are abundant authorities to warrant that opinion. The whole course of the authorities, from the case of *Yarborough v. The Bank of England*, 16 East 6, down to *Whitfield v. The South Eastern Railway Company*, 1 Ellis, Bl. & E. 115 (E. C. L. R. vol. 96), — which was in reality an action against the Electric Telegraph Company, shows that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on by Mr. Giffard, — that a corporation, having no soul, cannot be actuated by a malicious intention, — is more quaint than substantial. In coming to the conclusion we arrive at, we have no intention in the smallest degree to interfere with any of the decided cases; but, on the contrary, we found our judgment upon the numerous class of cases of which *Yarborough v. The Bank of England*, — where there is a most learned and elaborate argument of Lord Ellenborough, going fully into all the previous authorities, — is by no means the first, and which afford abundant examples of the application of the principle we now rely on. We may add that we dwell the less upon the grounds which have been urged by Mr. Giffard against the maintenance of the action, by reason of the extreme mischief and inconvenience which would follow from our holding that these companies incorporated for the purpose of carrying on trade were exempt from liability for intentional acts of wrong. We think it extremely important that these companies should be held responsible where they admit they have intentionally done a wrongful act, and that those whom they have injured should not be driven to seek a doubtful remedy against their officers or servants, who may be wholly unable to answer the compensation which the jury may award to the injured party. For these reasons, we are of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Dec 493

1. The law recognizes corp. responsibility for some visible tangible acts. Human beings act & responsible for some. Their acts least upon corp. Responsibility for any act, a human being may exercise if he can on corp. Responsibility Corp. A legal unit may be held responsible for act, another unit even tho' legal unit did n't permit to do act in qn. & then no. arms may be responsible for note, wh. tho' a has agd. 2. Unauthorized act is no more a fact than is auth. corp. act. If associates are une to act in name, corp. beyond auth. scope, then corp. actn. yi. unauth. corp. act. The charter or other legal pact does n't make pos. what is otherwise in the nature of the act. 3. I must n't be. But it is a fact that



## UNITED STATES v. JOHN KELSO COMPANY.

1898. 86 Federal Reporter, 304.

IN U. S. District Court for the Northern District of California.

DE HAVEN, District Judge. On October 9, 1897, there was filed in this court by the United States district attorney for this district, an information charging the defendant, a corporation, with the violation of "An Act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August 1, 1892 (2 Supp. Rep. St. p. 62). Upon the filing of this information, the court, upon motion of the district attorney, directed that a summons be served upon said corporation. The summons stated generally the nature of the charge, and for a more complete statement of such offence referred to the information on file. On the day named in said summons for its appearance, the defendant corporation appeared specially by its attorney, and moved to quash the summons, and to set aside the service thereof, upon grounds hereinafter stated. Upon the argument of this motion, it was claimed in behalf of the defendant: First, that the Act of Congress above referred to does not apply to corporations, because the intention is a necessary element of the crime therein defined, and a corporation as such is incapable of entertaining a criminal intention; second, that, conceding that a corporation may be guilty of a violation of said act, Congress has provided no mode for obtaining jurisdiction of a corporation in a criminal proceeding, and for that reason the summons issued by the court was unauthorized by law, and its service a nullity. It will be seen that the first objection goes directly to the sufficiency of the information, and presents precisely the same question as would a general demurrer, attacking the information on the ground of an alleged failure to charge the defendant with the commission of a public offence. This objection is one which would not ordinarily be considered upon a motion like that now before the court, when the party making the objection refuses to acknowledge the jurisdiction of the court, or to make any other than a special appearance for the purpose of attacking its jurisdiction; but, in view of the conclusion which I have reached upon the second point urged by the defendant, it becomes necessary for me to determine whether the Act of Congress above referred to is applicable to a corporation, and whether a corporation can be guilty of the crime of violating the provisions of said act. Section 1 of that act makes it unlawful for a contractor or sub-contractor upon any of the public works of the United States, whose duty it shall be to employ, direct, or control the services of laborers or mechanics upon such public works, "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of ex-

Information for  
viol? of the law  
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req? to constitute  
the offence.  
Pact intention  
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to do the prohibited  
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traordinary emergency." And section 2 of the act provides "that . . . any contractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any public works of the United States . . . who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every offence shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof." It will be observed that by the express language of this statute there must be an intentional violation of its provisions, in order to constitute the offence which the statute defines. In view of this express declaration, it is claimed in behalf of defendant that the act is not applicable to corporations, because it is not possible for a corporation to commit the crime described in the statute. The argument advanced to sustain this position is, in substance, this: That a corporation is only an artificial creation, without animate body or mind, and therefore, from its very nature, incapable of entertaining the specific intention which, by the statute, is made an essential element of the crime therein defined. The case of *State v. Great Works M. & M. Co.*, 20 Me. 41, supports this proposition, and it must be conceded that there are to be found dicta in many other cases to the effect that a corporation is not amenable to prosecution for a positive act of misfeasance, involving a specific intention to do an unlawful act. In a general sense, it may be said that no crime can be committed without a joint operation of act and intention. In many crimes, however, the only intention required is an intention to do the prohibited act, — that is to say, the crime is complete when the prohibited act has been intentionally done; and the more recent and better considered cases hold that a corporation may be charged with an offence which only involves this kind of intention, and may be properly convicted when, in its corporate capacity, and by direction of those controlling its corporate action, it does the prohibited act. In such a case the intention of its directors that the prohibited act should be done is imputed to the corporation itself. *State v. Morris E. R. Co.*, 23 N. J. Law, 360; *Reg. v. Great North of England Ry. Co.*, 58 E. C. L. 315; *Com. v. Proprietors of New Bedford Bridge*, 2 Gray, 339. See, also, *State v. Baltimore & O. R. Co.*, 15 W. Va. 380. That a corporation may be liable civilly for that class of torts in which a specific malicious intention is an essential element is not disputed at this day. Thus an action for malicious prosecution will lie against a banking corporation. *Reed v. Bank*, 130 Mass. 434; *Goodspeed v. Bank*, 22 Conn. 530. An action will lie also against a corporation for a malicious libel. *Railroad Co. v. Quigley*, 21 How. 202; *Maynard v. Insurance Co.*, 34 Cal. 48. The opinion in the latter case, delivered by Currey, C. J., is an able exposition of the law relating to the liability of corporations for malicious libel, and in the course of which that learned judge, in answer to the contention that corporations are mere legal

entities existing only in abstract contemplation, utterly incapable of malevolence, and without power to will good or evil, said :

"The directors are the chosen representatives of the corporation, and constitute, as already observed, to all purposes of dealing with others, the corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do any injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case."

The rules of evidence in relation to the manner of proving the fact of intention are necessarily the same in a criminal as in a civil case, and the same evidence which in a civil case would be sufficient to prove a specific or malicious intention upon the part of a corporation defendant would be sufficient to show a like intention upon the part of a corporation charged criminally with the doing of an act prohibited by the law. Of course, there are certain crimes of which a corporation cannot be guilty ; as, for instance, bigamy, perjury, rape, murder, and other offences, which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by natural persons, and statutes in relation thereto are for this reason never construed as referring to corporations ; but when a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted upon a corporation, — as, for instance, a fine. In the act of congress now under consideration it is made an offence for any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer employed upon any of the public works of the United States, to require or permit such laborer to work more than eight hours in any calendar day. A corporation may be a contractor or subcontractor in carrying on public works of the United States, and as such it has the power or capacity to violate this provision of the law. Corporations are, therefore, within the letter, and, as it is as much against the policy of the law for a corporation to violate these provisions as for a natural person so to do, they are also within the spirit of this statute ; and no reason is perceived why a corporation which does the prohibited act should be exempt from the punishment prescribed therefor. If the law were capable of the construction contended for by the defendant, the result would be that a corporation, in contracting for the doing of any public work, would be given a privilege denied to a natural person. Such an intention should not be imputed to congress, unless its language will admit of no other interpretation.



purpose of doing almost any kind of business as easily as partnerships, and many of the newspapers are published by corporations. Although natural persons who publish or assist in publishing a libel in a newspaper owned by a corporation may be punished criminally by fine or imprisonment, or both, yet if the corporation cannot be punished by a fine it will escape all criminal liability. The authors of libels are often irresponsible persons, and the remedy by private action against corporations for the publishing of libellous statements is often inadequate. That a corporation may be indicted for a misfeasance as well as for a nonfeasance has been decided in this Commonwealth. *Commonwealth v. New Bedford Bridge*, 2 Gray, 339. See *The Queen v. Great North of England Railway*, 9 Q. B. 315, 326. A corporation may be indicted for a libel. *State v. Atchison*, 3 Lea, 729; *S. C.* 31 Am. Rep. 663, and note. *Brennan v. Tracy*, 2 Mo. App. 540. *Pharmaceutical Society v. London & Provincial Supply Association*, 5 App. Cas. 857, 869, 870. 2 Bish. New Crim. Law, § 935, Newell, Slander & Libel (2d ed.) 362, 363. Odgers, Libel & Slander, (3d ed.) 436. Thompson, Corp. §§ 6418 *et seq.*

The publication of an article in a newspaper which is printed and circulated in the place where a trial is had pending the trial, and which concerns the cause on trial and is calculated to prejudice the jury in the cause and prevent a fair trial, often has been held to be a criminal contempt of the court trying the cause. *O'Shea v. O'Shea*, 15 P. D. 59. *Ex parte Green*, 7 Times Law Rep. 411. *Daw v. Eley*, L. R. 7 Eq. 49, 55. *Ramsbotham v. Senior*, L. R. 8 Eq. 575. *People v. Wilson*, 64 Ill. 195. *In re Sturoc*, 48 N. H. 428. *In re Cheeseman*, 10 Vroom, 115, 137. *State v. Frew*, 24 W. Va. 416. Oswald, Contempt of court, (2d ed.) 58 *et seq.* 7 Am. & Eng. Encyc. of Law, (2d ed.) 59. If a corporation publishes the article, we see no reason why it should not be held liable for a criminal contempt. Thompson, Corp. §§ 6448 *et seq.* 7 Am. & Eng. Encyc. of Law, (2d ed.) 847 and cases cited.

[After discussing the power to punish for contempt, and the method of procedure.]

The most important question is whether the publication of these articles under the circumstances stated could be adjudged a contempt. The articles published were not defamatory, either as regards the presiding justice of the court or the jurors before whom the cause referred to was being tried, or the parties to the cause. In one case the court discharged the treasurer and manager of the newspaper, and in the other the editor and the publisher, on the ground that they were not shown to be directly responsible for the publications. It is probable, although this does not expressly appear in the papers before us, that the person or persons employed to report for each newspaper the proceedings of the court wrote the articles and caused them to be published. The Superior Court has not found that there was an intent to influence the trial of the cause referred to on the part of anybody.

The articles are objectionable only because they purport to state the amount of money which the town offered to pay the plaintiff, and the amount the plaintiff demanded before the petition was brought. The law encourages attempts to settle or compromise disputes without subjecting the parties to any liability, if the attempts fail, of having any concessions therein made to avoid litigation put in evidence against them in the subsequent litigation. *Upton v. South Reading Branch Railroad*, 9 Cush. 600. *Harrington v. Lincoln*, 4 Gray, 563. *Gay v. Bates*, 99 Mass. 263. *Draper v. Hatfield*, 124 Mass. 53. We are content to assume that the person or persons who wrote and caused the articles to be published did not know this rule of law, and acted without any intent to pervert the course of justice. As the only intent which can be imputed to the corporations is the intent of its officers or agents, the question is whether the publication of these articles without any intent to pervert the course of justice can be adjudged a contempt. In *Metropolitan Music Hall Co. v. Lake*, 58 L. J. (N. S.) Ch. 513, it is said that it must be shown that the articles were published with knowledge of the pending cause, and that appears in the present cases.

In *Cartwright's Case*, *ubi supra*, it is said by the court: "But the jurisdiction and power of the court do not depend upon the question whether the offence might or might not be punished by indictment. . . . 'As regards the question whether a contempt has or has not been committed, it does not depend upon the intention of the party, but upon the act he has done.' By Taney, C. J., in *Wartman v. Wartman*, Taney, 362, 370." If a person talk with or send a statement to a juror about a cause, during the trial of it, in such a manner that it may cause prejudice or bias in the cause, although the intent with which the person acted may affect the amount of his punishment, he cannot justify his conduct by showing that he had no evil intent, and knew no better.

It was not necessary that the Superior Court should find that the articles published actually had been read by some of the jurors while trying the cause to which the articles referred. They plainly had been read by the presiding justice during the trial, and it was likely that they had been read by some of the jurors. The intention of the publisher of a newspaper is that it should be bought and read by persons within the place where it circulates. Cases before a court should be determined on evidence presented in court. It is an inevitable perversion of the proper administration of justice to attempt to influence the judge or jury in the determination of a cause pending before them by statements outside of the court room, and not in the presence of the parties, which may be false, and even if they are true are in law not admissible as evidence.

We cannot say that it appears that the Superior Court erred in adjudging that the publication of these articles, under the circumstances stated, was a contempt of that court, and it was for that court

to determine whether it was necessary to institute proceedings for contempt in order to vindicate its authority to secure the due administration of justice in a cause pending before it. The publications contained statements of facts, evidence of which was not competent at the trial and was not introduced at the trial, and they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and the natural and probable effect of them would be improperly to influence the justice and the jury in the determination of the cause.

The proper method of collecting a fine imposed upon a corporation is by a levy of an execution issued by the court. *The King v. Woolf*, 2 B. & Ald. 609; *S. C. 1 Chitty*, 583. *Huddleson v. Ruffin*, 6 Ohio St. 604. 1 *Chitty, Crim. Law* (2d ed.), 811. 1 *Bish. New Crim. Proc.* §§ 1303 *et seq.*

*See 493. 69 St. 919 - cf 242 R 673* Judgments affirmed.  
*Lat. propland 7 aq. 3.*

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**MONUMENT NAT'L BANK v. GLOBE WORKS.**

1869. 101 *Mass.* 57.

HOAR, J. The single question presented for our decision in this cause, all others which arise upon the report having been waived, is, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, cannot be enforced against them, because it was in fact made as an accommodation note.

The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any persons taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defence cannot be maintained.

It has long been settled in this Commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. *Nor-ragansett Bank v. Atlantic Silk Co.* 3 Met. 282. And it was held in

*Bird v. Daggett*, 97 Mass. 494, as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully stated, in *Bird v. Daggett*; but it was assumed that the doctrine announced was clear and undoubted law.

The doctrine of *ultra vires* has been carried much farther in England than the courts in this country have been disposed to extend it; but, with just limitations, the principle cannot be questioned, that the limitations to the authority, powers and liability of a corporation are to be found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply. As was said by Selden, J., in *Bissell v. Michigan Southern & Northern Indiana Railroad Co.* 22 N. Y. 289, 290: "There are no doubt cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bonâ fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

This doctrine seems to us sound and reasonable; and in conformity with it, it was held in *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.* 5 Bosw. 275, that an accommodation acceptance by an



Principal must respond for C, this A made no real act but a apparent act; sim-  
larly if a corp has act to do a certn act & some circs, it apprs an act & act to do  
such act & such circs, & Adm: each & other circs responsbly for act will be cast  
on corp in favor of outsiders who did not know the act was unauthorized

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NIMS v. MOUNT HERMON BOYS' SCHOOL.

officer of a manufacturing corporation, on behalf of the company, was not binding, unless the consideration had been advanced upon the faith of the acceptance; but that if the consideration was paid in good faith after the acceptance, and upon the credit of it, it could be enforced.

So it was said by Lord St. Leonards that he felt a disposition "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into." *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 331, 373.

The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or for the most part those in which the other contracting party had notice upon the face of the transaction of the want of corporate power.

There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful acts of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this Commonwealth, for one committed by its servants. Bills of a bank issued without consideration, and even stolen, are good in the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests.

*Judgment for the plaintiffs.*

*R. H. Dana, Jr., & T. K. Lothrop*, for the defendants.

*C. A. Welch & W. W. Warren*, for the plaintiffs.

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Why must Corp as a whole & not dir<sup>s</sup> approve or order unauthorized  
bus. Simply: it is a fundamental bus q<sup>n</sup> as to the whole body, which is corp organ.

NIMS v. MOUNT HERMON BOYS' SCHOOL.

1893. 160 Massachusetts, 177.

KNOWLTON, J. The defendant is an educational corporation. The plaintiff seeks to recover damages for an injury received through the negligence of a ferryman in managing a boat on which he was a passenger, and which, as he alleges, the defendant was using at a public ferry in the business of carrying passengers for hire. At the request of the defendant, the presiding justice ruled that there was no evidence to warrant a finding for the plaintiff, and directed a verdict for the defendant. The defendant contends that the ruling should be sustained on one or both of two grounds. It says in the first place, that, if it maintained the ferry and hired and paid the ferryman, the business was

of all corp. associates have consented to fund, or Corp. do (employ in a venture outside (escape) corp. acts whether, consent be formal or implicit man acquiesc (corp. shdn be allowed to escape liability)

*ultra vires*, and therefore it is not liable for negligence in the management of the boat. Secondly, it contends that there was no evidence to connect the corporation with the business of running the ferry-boat, or to show that the ferryman was its servant.

It is a general rule that corporations are liable for their torts as natural persons are. It is no defence to an action for a tort to show that the corporation is not authorized by its charter to do wrong. Recovery may be had against corporations for assault and battery, for libel and for malicious prosecution, as well as for torts resulting from negligent management of the corporate business. *Moore v. Fitchburg Railroad*, 4 Gray, 465. *Reed v. Home Savings Bank*, 130 Mass. 443. *Fogg v. Boston & Lowell Railroad*, 148 Mass. 513. *Philadelphia, Wilmington, & Baltimore Railroad v. Quigley*, 21 How. 202, 209. *Merchants' Bank v. State Bank*, 10 Wall. 604. *National Bank v. Graham*, 100 U. S. 699. *Gruber v. Washington & Jamesville Railroad*, 92 N. C. 1. *Hussey v. Norfolk Southern Railroad*, 98 N. C. 34. If a corporation by its officers or agents unlawfully injures a person, whether intentionally or negligently, it would be most unjust to allow it to escape responsibility on the ground that its act is *ultra vires*. The only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferry-boat is that the contract to carry the plaintiff was *ultra vires*, and therefore invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void. The defendant may argue that the plaintiff cannot maintain an action for a breach of the contract to use proper care to carry him safely, and that he stands no better when he sues in tort for failure to do the duty which grew out of the contract.

In *Bissell v. Michigan Southern & Northern Indiana Railroad*, 22 N. Y. 258, the plaintiff founded his action on the negligence of the two defendants while jointly running cars on a railroad in a State to which the charter of neither of them extended, and it was conceded that the defendants were acting *ultra vires*. The plaintiff recovered, Comstock, C. J. holding in an elaborate opinion that the corporations were liable under their contract, notwithstanding that the contract was *ultra vires*, and that if they could not be held under their contract they could not be held at all, inasmuch as the only negligence alleged was a failure to use the care which the contract called for. Selden, J., in an equally full and elaborate opinion, held that the contract for carriage was invalid, and that there could be no recovery under it, nor for negligence founded upon it; but it was his opinion that, if the contract were set aside, the defendants owed the plaintiff a duty founded on his relation to them as an occupant, with their permission, of a place in their car, and that the improper management of the car was a neglect of that duty for which the plaintiff could recover. Clerke, J. agreed with this view, and all but one of the other judges concurred in a decision

for the plaintiff, without stating the ground on which they thought the decision should be placed. This case was followed in *Buffett v. Troy & Boston Railroad*, 40 N. Y. 168, in which it was held that a railroad corporation was liable for negligence of the driver of a stage-coach which it was running without a legal right to do a business of that kind; but the opinion does not show whether the decision is founded on the opinion of Comstock, C. J., given in the former case, or on that of Selden, J. Like decisions have been made under similar facts in *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572; *New York, Lake Erie, & Western Railway v. Haring*, 18 Vroom, 137; and *Hutchinson v. Western & Atlantic Railroad*, 6 Heisk. 634.

The better doctrine seems to be that a contract made by a corporation in violation of its charter, or in excess of the powers granted to it either expressly or by implication, is invalid considered merely as a contract, and, so long as it is entirely executory, will not be enforced. It is not only a violation of a private trust, viewed in reference to the stockholders, but it is against the policy of the law, which intends that corporations deriving their powers solely from the Legislature shall not pass beyond the limits of the field of activity in which they are permitted by their charter to work. *Monument National Bank v. Globe Works*, 101 Mass. 57. *Attorney General v. Tudor Ice Co.* 104 Mass. 239. *Davis v. Old Colony Railroad*, 131 Mass. 258. *Thomas v. Railroad Co.* 101 U. S. 71. *Leslie v. Lorillard*, 110 N. Y. 519. *Linkauf v. Lombard*, 137 N. Y. 417. *East Anglian Railways v. Eastern Counties Railway*, 11 C. B. 775, 803. On the other hand, courts have frequently held that, while such contracts considered merely as contracts are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail when to allow it would work injustice and accomplish legal wrong. *Leslie v. Lorillard*, 110 N. Y. 519. *Linkauf v. Lombard*, 137 N. Y. 417, 423. Many cases might be supposed in which it would be most unjust to hold that one who had received the benefits of such a contract might retain them and leave the other party without remedy, as he might do in a supposable case, where another had put himself at a disadvantage on the faith of a contract with him to commit a crime. Whether in this Commonwealth a contract entered into by a corporation *ultra vires*, and partly performed, will ever be enforced on equitable grounds, we need not now decide. See *McChuer v. Manchester & Lawrence Railroad*, 13 Gray, 124; *National Pemberton Bank v. Porter*, 125 Mass. 833; *Attleborough National Bank v. Rogers*, 125 Mass. 339; *Atlas National Bank v. Savery*, 127 Mass. 75, 77; *Slater Woollen Co. v. Lamb*, 143 Mass. 420; *Prescott National Bank v. Butler*, 157 Mass.

548; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Parish v. Wheeler*, 22 N. Y. 494; *Oil Creek & Allegheny River Railroad v. Pennsylvania Transportation Co.* 83 Penn. St. 160; *Bradley v. Ballard*, 55 Ill. 413. In the present case we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts, and do anything else incidental to the maintenance of the school. Doubtless some of its officers or agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was *ultra vires* but its acts in that respect were not different in kind from the ordinary acts of corporations in excess of the powers given them by their charter. We are of opinion, therefore, that if the defendant while running the ferry-boat accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across the river, he was in the boat as a licensee, it owed him the duty to use proper care to carry him safely, and, whether an action could be maintained for a breach of the contract or not, it is liable to the plaintiff in an action of tort for neglect of that duty.

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be liable  
if it operated

The other question in the case is whether there was evidence that the corporation operated the ferry. Under its by-laws the management of the corporation is vested in a board of trustees. It does not appear that any vote was ever taken in regard to the ferry, and it was not shown that any officer of the corporation took out the license which was granted to the defendant by the county commissioners, under Pub. Sts. c. 55, § 1, to keep the ferry, but the records of the county commissioners show that such a license was granted, and that a bond with sureties was given to the county of Franklin, with the condition properly to perform the duty of a ferryman, executed in behalf of the defendant by one who was designated as superintendent, and witnessed by the defendant's cashier and paymaster. It further appeared that the title to the property used at the ferry was taken by Ambert G. Moody, one of the trustees of the defendant, who was then a student in Amherst College, and that he paid for it only a nominal sum above the mortgage existing upon it, and that he and the defendant's superintendent, who had charge of its farm, employed one Deane to operate the ferry, who was paid by the month, and who turned over the balance of the receipts of the ferry above his wages to the defendant's cashier and paymaster. For the month of April Deane was paid for his services by the defendant's paymaster out of the defendant's funds. In June, 1890, a new ferry-boat was constructed under an arrangement with Ambert G. Moody and Dwight L. Moody, both of whom were trustees of the corporation, and was paid for by the paymaster out of the funds of the corporation. For six months, and until there was a change in the management of the ferry, the defendant's cashier and paymaster sent to the treasurer, who lived in New York,

monthly accounts, showing monthly receipts and expenses on account of the ferry. Accompanying the first of these accounts was a statement that the school was running the ferry and paying the bills. The treasurer was himself a trustee of the corporation. He subsequently rendered his official report to the corporation, which was audited by another of the trustees, who did not examine the items in person, but caused the examination to be made by a man in his employment. This report was accepted by the trustees and placed on file. The items of receipts and expenditures were entered on the books of the treasurer in an account under the title "ferry." The treasurer's report was not put in evidence, and was not produced, although the defendant was notified to produce it.

There is no evidence of original authority from the defendant to anybody to operate the ferry on its account, but the evidence is plenary that persons connected with the management of its business assumed so to operate it. The important question is whether there was evidence that the corporation ratified the acts of these persons. We are of opinion that there was evidence from which the jury might have found such ratification. It is not necessary that the ratification should be by a formal vote. It is enough if the corporation, acting through its managing officers, knowing that the business had been done by those who assumed to act as its agents in doing it, and that the income of the business had been received and the expenses of it paid by its treasurer in his official capacity, and that the balance of the receipts above the expenditures was in its treasury, adopted the action of its treasurer, and elected to keep the money. It was a fair inference of fact, especially when the corporation failed to produce the treasurer's report after notice to produce it, that the report contained a true statement of the accounts which related to the ferry, and that it was accepted with full knowledge on the part of the trustees of what it contained. Whether there was a ratification by the corporation was a question of fact for the jury on all the evidence.

If there was such a ratification, it carried with it the consequences which would have followed an original authority. In *Dempsey v. Chambers*, 154 Mass. 330, it was held, after much consideration, that ratification of an unauthorized act would make the principal liable in an action of tort for an injury resulting from negligence of the agent in doing the act.

We are of opinion that the case should have been submitted to the jury.

*Exceptions sustained.*

*D. Malone*, for the plaintiff.

*C. C. Conant*, for the defendant.

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## CENTRAL R. R. &amp; BANKING CO. v. SMITH.

1884. 76 *Alabama*, 572.<sup>1</sup>

## APPEAL from Circuit Court.

Action by Smith against the appellant, described as "a corporation created by the laws of Georgia, and doing business in Alabama by agents." Plaintiff seeks to recover damages for injuries sustained by the sinking of the steamboat *George W. Wully*, while running on the Chattahoochee river; the plaintiff having been a passenger at the time.

The complaint alleged that the defendant corporation was a common carrier, and was, in connection with one Whitesides (who was not sued), the owner and proprietor of said steamboat, and engaged in running and operating it for the transportation of passengers and freight for a reward; and that the accident and injury were caused by the negligence of the officers and persons in charge of the boat, and its unsound and rotten condition. The defendant pleaded not guilty, and a special plea which averred, in substance, that it had no authority under its charter to engage in running a steamboat on the Chattahoochee river, and that the persons who were engaged in running said steamboat, at the time of the alleged loss and injury, were not the agents or servants of said defendant. Issue was joined on both of these pleas.

Upon the trial certain evidence was admitted, against defendant's objection, to prove ownership of the steamer, and partnership or agency in operating it.

The Court, at defendant's request, instructed the jury that the defendant had no power under its charter to own or operate the steamboat. The Court, however, at plaintiff's request, added to this instruction: "But this will not excuse defendants, if the evidence shows they did operate it." To this addition, defendant excepted.

*J. D. Roquemore*, and *John Peabody*, for appellant.

*S. F. Rice*, and *H. R. Shorter*, contra.

CLOPTON, J. [The Court *held*, that certain evidence was improperly admitted. The Court also *held*, that the corporation had no power, under its charter, to own and operate the steamboat in association with a natural person. The opinion then proceeds as follows:]

7. With the postulate assumed, that the defendant has no authority to own and operate, in association with a natural person, a steamboat on the Chattahoochee river, for carrying persons and freights, there remains to be considered the liability of the defendant to a person for injuries suffered on a boat thus owned and operated, while a passenger thereon.

This court has repeatedly decided, that the contracts of corporations, which they have no power to make, are void, and that the courts will

<sup>1</sup> Statement abridged. Argument and part of opinion omitted. — Ed.

not enforce them. "Such contracts on the part of a corporation are *ultra vires*, and void, and no right of action can spring out of them." — *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Chambers v. Falkner*, 65 Ala. 448. No contract made by a corporation, not within the scope of its powers, can be made valid, or the foundation of a right of action, by the assent of the shareholders. If the corporation attempts to carry such contract into execution, dissentient stockholders, though a minority, may restrain its consummation. And if suit is brought against the corporation on such contract, they may avail themselves of the defense of *ultra vires*. — *Davis v. Old Col. R. R. Co.*, 131 Mass. 258. The settled doctrine of this court is, that a reception and retention of the fruits and benefits of the transaction do not estop the corporation from denying its power to make the contract; though an action may be maintained, in a proper case, against a corporation, for the money or property received, the legal effect of such suit being a disaffirmance of the prohibited contract.

Were the present action founded on a contract of transportation, it is unquestionable, that the defendant could successfully interpose the defense of *ultra vires*. The action is, however, *ex delicto*, founded on the common-law duty of a common carrier. The plaintiff does not require the aid of an illegal contract to establish his case; its enforcement is not necessary to entitle him to a recovery. The rules applicable are those which govern in cases of torts committed by a corporation. The question is, what is the liability of a corporation for a tort, committed while transacting a business without and beyond the purview of the corporate powers and purposes? This is followed by another question; by what authority; and in what manner, can a corporation be subjected to such liability?

While, as the law confers no power or permission to commit a wrongful act, every species of tort may be technically *ultra vires*, it is well established, that corporations may commit almost every kind of tort, and be liable to an action for the same. In such case, the doctrine of *ultra vires* has no application. — *Mer. Bank v. State Bank*, 10 Wall. 604. "A corporation is liable to the same extent, and under the same circumstances as a natural person, for the consequences of its wrongful acts, and will be held to respond in a civil action, at the suit of an injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature, or beyond its general powers, the wrongful transaction or act may be." — *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30. Accordingly, actions have been maintained against corporations for libel, malicious prosecutions, assault, and other torts too numerous to be mentioned. — *Green v. Lon. Gen. Om. Co.*, 7 Com. B., N. S. 388; *P. W. & B. R. R. Co. v. Quigby*, 21 How. 202; *Jordan v. Ala. Gt. So. R. R. Co.*, 74 Ala. 85. Generally, it may be said, that corporations are liable for the consequences of tortious acts done by its authority, though not within the scope of its powers, express, implied, or incidental. The distinc-

tion between the liability of a corporation, on an unauthorized contract, and for a negligent or wrongful act in the performance of such contract, is clearly and properly drawn by Selden, J., in *Bissell v. Mich. So. & No. Ind. R. R. Cos.*, 22 N. Y. 258; which was an action by a passenger on a train of cars, which by contract the two companies were unitedly running, for a breach of duty to convey him safely, the passenger having been injured by the negligence of their servants. The defense of the companies was, that, in making the contract, they transcended their powers, and, consequently, in judgment of law, they were not operating the road, and did not undertake to carry the plaintiff over it. After holding that the contract to operate the consolidated roads, and to transport the plaintiff, was illegal and void, he says: "It is said, that if the contract was *ultra vires*, and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted while attempting to perform it. But this, I apprehend, by no means follows, though it is probably true, so far as the duty to observe due care grows out of the contract. The plaintiff's claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or has been run over by a train of cars, when crossing the railroad track. The duty to observe care, in these cases, arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct as not through their negligence to inflict injury upon others." An exemption from liability in such cases, because the act is *ultra vires*, would be a license to corporations to do wrongs to others. From these principles it follows, that if the defendant undertook the business of transporting persons by a mode of conveyance other than that authorized and provided by the charter, its duties and responsibilities to a passenger are the same as if the business was authorized and legal.

8. But, before the duties and responsibilities attach, the corporation must undertake and engage in the business, and thereby assume its burdens. Of this there can be no implication, from the isolated fact, that some officer or agent has engaged, in the name of the company, in running and operating the boats; in other words, there can be no implication that a corporation has made a contract, or engaged in business transcending its powers. — Green's Brice's Ul. Vires, 364. It may be inferred from proved circumstances, as other facts, but is not the subject of implication. Corporations are responsible for the wrongs committed by their officers, agents, or servants, while in the course of their employment; but, if the officer, agent, or servant, "go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not." *Gilliam v. S. & N. R. R. Co.*, 70 Ala. 268.



The limitation is, the scope of the employment, or delegated authority. If an officer or agent can not directly subject the corporation to liability for his tortious act beyond the range and course of his employment, though done while engaged in its performance, for what reason, or on what principle is it, that an officer or agent can, by making an unlawful transaction, and engaging in an unauthorized and unlawful business, in the name of the company, without the authority of the corporation, indirectly subject it to liability for the negligent or intentional wrongs of the agents or servants employed by him in the performance of such contract, or in carrying on such business? While corporations should be held to a strict responsibility for the wrongful acts of their employees, when done in the course of their employment, and connected with the execution of the business for which incorporated, they should be protected against the consequences of unauthorized acts of their officers or agents, committed in excess of its powers, and unconnected with the business or purposes of their incorporation and organization, especially when dealing with persons charged with notice of their powers, and the nature and extent of the employment and authority of the officer or agent.

In *Brokaw v. N. J. R. & T. Co.*, 32 N. J. Law, 328, it is said: "In considering the question whether the agent has the authority of the corporation, so as to make it answerable for his act, the purposes for which the company was incorporated must not be overlooked. An authority given even by the board of directors, in express terms, will not, in all cases, be the authority of the corporation. The directors are only agents themselves, and their powers are necessarily limited within the scope of the purposes for which the corporation was created, beyond which they are not authorized to bind the corporation. To fix the liability of a corporation for the tortious acts of one of its employees, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorporated. If the directors should order an agent to take a person out of his house and beat him; or if the directors of a banking company should purchase a steamboat, and engage in transporting passengers, the corporation would not be liable for the misfeasance or nonfeasance of agents employed in that business." It is true that the board of directors may be invested by the charter, or general law, with such management and authority as practically to constitute it the corporation; but, by the provisions of the charter of the defendants, the directors are agents and representatives, with authority limited by the scope of the powers, business, and purposes of the corporation. It will be observed that the business was not carried on in the name of the corporation. As there is no implied authority of any officer or agent to make an *ultra-vires* contract, or transaction, and on that ground merely bind the corporation, it follows, that if the boats were purchased and engaged, in connection with Whitesides, in the business of transporting persons and freight on the Chattahoochee river, by the pres-

dent, superintendent, or even the directors, the corporation is not bound thereby, and is not liable for the negligent or wrongful acts of the persons employed in such business, unless the transaction was previously authorized, or subsequently ratified by the corporation. Without such authority or ratification, the persons thus employed are not the agents or employees of the corporation. As the immediate or direct act of the officer or agent, in such case, can not bind the corporation, his mere knowledge of, and acquiescence in the prosecution of such business, are not tantamount to a ratification by the corporation. Considering the difference between the principles which govern the liability of the company for the tortious acts of its agents committed in the course of their authorized employment, and its liability for the tortious acts of persons employed in the conduct and prosecution of a business undertaken on behalf of the corporation by its agents, beyond the range of their employment, and prohibited by the laws of its creation, the previous authority or subsequent ratification, in order to bind the corporation, must be in corporate capacity.

A corporation is an artificial body, a distinct person, in legal contemplation, from the stockholders, in which the corporate property is vested. Its will is usually or ordinarily expressed at a meeting of the corporators. Its officers are its agents, and not the agents of the stockholders. In this sense, previous authority, to bind the corporation by the act of an officer or agent transcending its powers and unconnected with its authorized business and purposes, must be the result of corporate action, as contradistinguished from the individual action of the stockholders or officers. Subsequent ratification results, when a knowledge of the business being thus conducted, and of the reception and retention of its fruits and benefits, is brought home to the corporators, at a time, and under circumstances which require them to elect to repudiate or be bound, and they fail to disavow the act; in other words, any facts, which would be a ratification of the unauthorized acts of an agent by a principal who is a natural person.

An application of these principles will probably be a sufficient guide on another trial. *Take extract - Mines Delch Co. v. Jellerbach. 37/543. 570-580-81.*

*Reversed and remanded. rep. 587 600-602*

*J. Mayor of Norwich v. Norfolk R. Co. 30 E. L. & E. G. 128. Earle cited at some length in Mines Delch Co. v. Jellerbach 37/543. 580-81.*

*Would a c by a Ry Co for a chapel or a theatre be void? - - -*

*It would or would not, accord as c purp. Contractly parties was or was not connected c Ry. I thought it a special rep c Ry, prohibited. Or if works were wanted in a waste place c Co found it for them out to build a town supply it with all reqs for inhabitation & in order to secure a permanent supply of workmen of skill responses, added a chapel & a theatre with relig secular instruct, thought for c purp of Ry valid & this distinctly connected & outlay might be found eventually to increase π & c traffic*

THE PHOENIX LIFE ASSURANCE COMPANY; BURGES  
& STOCK'S CASE.

1862. 2 *Johnson & Hemming*, 441.<sup>1</sup>

THE Phoenix Life Assurance Company was formed under the Joint Stock Companies Act (7 & 8 Vict. c. 110), under a deed of settlement, dated May 5, 1848, in which the business of the company was stated to be life assurance.

In 1858, the company, in accordance with a vote at a general meeting, commenced insuring marine risks. The company issued policies to Messrs. Burges & Stock on various vessels, on some of which losses occurred.

In 1860, an order was made for winding up the company.

Burges & Stock undertook to prove against the company for the amount of their claims on marine policies.

*Giffard*, Q.C., and *J. Russell*, for Burges & Stock.

*Kay*, for the creditors' representative.

*Fry* (*Sir H. Cairns*, Q.C., with him), for the official manager.

SIR W. PAGE WOOD, VICE-CHANCELLOR. [After deciding that the claimants would not be allowed to prove for losses upon marine policies:]

There is one point as to which I reserved my judgment, viz., whether Messrs Burges and Stock are entitled to prove for the amount of the premiums paid by them. It appears from the proceedings that the total amount of premiums received falls far short of the total payments made in respect of the marine business, but this cannot affect the rights of these claimants. They have had no consideration for the premiums they paid. The directors, it is true, had no power to issue marine policies, but they had power to receive money, and apply it for the benefit of the company. It is proved that they did so receive and apply these premiums, and the amount might have been recovered, even at law, as money had and received. The proof must therefore be allowed for the amount of the premiums paid.

<sup>1</sup> Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — Ed.

*There (shh?) consented to U.V. act but they make conf. respons<sup>6</sup> mfg & recd*

## CHAPTER IV.

### COLLATERAL ATTACK UPON THE FORMATION OF A CORPORATION. HEREIN OF THE EXPRESSION "*DE FACTO CORPORATION*."

#### (A) *Where there have been Dealings between the Parties on a Corporate Basis.*

THE law<sup>1</sup> deals with rights, and the corresponding obligations. Every right belongs to a legal unit or units; every obligation binds a legal unit or units.

A human being is, in the nature of things, a unit. A philosopher might entertain a doubt upon this, — *homo* might seem to him merely a convenient word by which to designate a large number of molecules. But the common law judges seem never to have doubted.

A human being may be so circumstanced that the courts do not find it proper to recognize him or her as a legal unit for some, or any, purpose. Thus of slaves, monks, aliens, traitors, lunatics, infants, and married women. But usually a human being will be recognized as a legal unit.

Two or more persons may unite to accomplish a common purpose. Thus is formed a gild, a partnership, a college, a church, a club. Will these persons, so united, be recognized by the courts as a legal unit?

Undoubtedly, if the sovereign has authorized them to act as a unit. Persons so authorized are said to be incorporated. A corporation *de jure* may be defined as a body of persons legally authorized to act as a unit.<sup>2</sup>

But suppose the sovereign has not authorized them. Two questions arise: is there anything, in the nature of things, which prevents the associates from in fact acting as a unit, or which prevents the courts from recognizing them as a legal unit? Are there sufficient reasons of policy to deter the courts from recognizing such a body as a legal unit?

For centuries the leading case on corporations in England was the Case of Sutton's Hospital.<sup>3</sup> The king, at the petition of Sutton, had

<sup>1</sup> This is a reprint of a portion of an article by the editor in 21 *Harvard Law Review*, 305.

<sup>2</sup> A corporation sole is a term, not altogether happy, but established by usage, indicating a person some of whose rights and liabilities are permitted by law to pass to his successors in a particular office, rather than to his heirs, executors, or administrators. Such a "corporation" was unknown in the civil law. This article deals with corporations aggregate.

<sup>3</sup> 10 Coke, 1, 23 (1612).

granted a charter for the purpose of incorporating the master and governors of a hospital to be founded by Sutton. Sutton thereafter purported to convey land to such corporation. His heir contended that there was no corporation, and that the conveyance was void, but the court held both the incorporation and the deed to be valid.

One objection raised by the heir was that "until there be an actual hospital and poor in it, there cannot be governors of them, for governors ought not to be idle, or as cyphers in algebra."<sup>1</sup> The court held that the incorporation of the persons might well precede the foundation of the hospital. We find this language: "And it is great reason that an hospital, &c., in expectancy or intendment, or nomination, should be sufficient to support the name of an incorporation when the corporation itself is only *in abstracto*, and rests only in intendment and consideration of the law; for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law. . . . They cannot commit treason, nor be outlawed, nor excommunicate, for they have no soul, neither can they appear in person, but by attorney. . . . A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person nor swear."<sup>2</sup> And, on another point, the report runs: "If the King gives licence to grant to the Mayor and Commonalty of Islington, it is void where there is not any such incorporation, although the inhabitants of Islington be afterwards incorporated by the name of Mayor and Commonalty, because there was no such corporation *in rer' natura* at the time of the grant."<sup>3</sup>

Blackstone followed Coke: A corporation aggregate "must always appear by attorney, for it cannot appear in person, being, as Sir Edward Coke says, invisible and existing only in intendment and consideration of law. It can neither maintain, nor be made defendant to, an action of battery, or such like personal injuries; for a corporation can neither beat nor be beaten, in its body politic. . . . It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office."<sup>4</sup>

Notwithstanding the great respect due to any language used by Coke and Blackstone, it is submitted that the conception of a corporation as an invisible being, existing only in intendment of law, makes for confusion.

A number of men unite to accomplish a common purpose. This body is authorized by the sovereign to act as a unit. There is nothing in *rerum natura* after such authority has been given which was not there before. There is no mysticism about incorporation. The

<sup>1</sup> 10 Coke, 23 b.

<sup>2</sup> *Ibid.* 32 b.

<sup>3</sup> *Ibid.* 27 b. In *Bank v. Allen*, 11 Vt. 302, counsel for defendant spoke of a plea of *nul tiel corporation* as equivalent to a plea of *nul tiel persona in rerum natura*.

<sup>4</sup> 1 Bl. Comm. 476. Marshall, C. J., used similar language in *Dartmouth College v. Woodward*, 4 Wheat. (U. S.), 518, 636. In a later case, *Bank v. Dandridge*, 12 Wheat. (U. S.), 64, he held (in a dissenting opinion) that an oral contract cannot be binding upon a corporation, because a corporation has no voice.

sovereign's charter does not work magic, calling forth a metaphysical being.

When the reasons of policy against recognizing a married woman as a legal unit gave way, the courts, in henceforth recognizing her as a legal unit, did not bring a new thing *in rerum naturam*.

The conclusions which Coke and Blackstone drew from their conception of a corporation have, in the main, ceased to be law. The notions that a corporation cannot commit a trespass upon the person and cannot be an executor are altogether exploded.

In the nature of things, units may be so associated together as to form a new unit. The biologist speaks of composite units. Persons, by their own voluntary action, may unite, may in fact form a new, a composite, unit, quite without the sovereign's charter. The charter authorizes what was before unauthorized; it does not make possible what was before impossible.

From very early times the courts have recognized some unchartered bodies of persons as legal units. These bodies were called corporations of common right, or corporations at the common law. Thus the unchartered parishioners of a church were, for some purposes, a corporation at the common law.<sup>1</sup> A corporation at the common law is not to be confounded with a corporation by prescription. If a particular body of men and their predecessors have long acted as a corporation, such long user lays a foundation for the presumption that the sovereign had in ancient times granted them a charter, and that this has been lost. But the parishioners of a particular church did not need to show that they, or their predecessors, had long acted as a corporation. It was enough that it was the common usage for parishioners of any church so to act. There were, then, certain unchartered bodies of persons which were recognized by the courts as legal units; the doctrine is treated as clearly established by both Littleton and Fineux.<sup>2</sup> Now, if the courts could recognize as legal units some unchartered bodies of persons, they could have so recognized all such bodies. They did not refuse to recognize some unchartered bodies as legal units because of any obstacle arising out of the nature of things.

In *New Orleans Co. v. Louisiana*,<sup>3</sup> *quo warranto* was brought in a state court against the X company, and judgment was rendered that

<sup>1</sup> See Y. B., 11 Hen. IV, 12; Y. B., 37 Hen. VI, 30; Y. B., 8 Edw. IV, 6; Co. Lit. 3 a; Finch's Law, c. xvii; Kellw. 32 a; 2 P. Wms. 125; 4 Vin. Abr. 525. For the purposes of this article it would be unprofitable to inquire whether the corporation was, strictly, the whole body of the parishioners, or only the wardens of the church. In Y. B., 12 Hen. VII, 27, Fineux, C. J., held that the parishioners are a corporation at common law for the purpose of protecting the goods of the church, but are not a corporation for other purposes. There had been a note in Y. B., 10 Hen. IV, 3, to the same effect.

<sup>2</sup> Y. B., 20 Edw. IV, 2 (per Littleton); Y. B., 14 Hen. VIII, 2 (per Fineux).

There is also evidence tending to show that, in early times, the Court of Exchequer, in revenue matters, allowed unchartered bodies of men to be sued, and even to sue, as a unit. *Madox, Firma Burgi*, 85, 91.

<sup>3</sup> 180 U. S. 320.

such company had never been legally incorporated. The individuals associated in the company were not named as parties in the proceeding; the company was the sole defendant, being served in the method required for service upon a corporation. And the federal court held this procedure to be proper. If a body of men, not authorized by the sovereign to act as a unit, cannot in fact act as a unit, and cannot be treated by the courts as a legal unit, who was the defendant in this proceeding?

We conclude that there is nothing in the nature of things which prevents a body of persons, unauthorized by the sovereign to act as a unit, from in fact acting as a unit. Legal units are such units in fact as the courts see fit to recognize as legal units, — any unit in fact *may* be so recognized. There is therefore nothing in the nature of things which prevents a court from recognizing as a legal unit a body of persons unauthorized by the sovereign to act as a unit, but in fact acting as a unit.

Are there sufficient reasons of policy to prevent the courts from recognizing such a body as a unit?

Madox states that "anciently a Gild either Religious or Secular could not legally be set-up without the King's Licence. If any Persons erected a Gild without Warrant, that is, without the King's leave, it was a Trespass, and they were lyable to be punished for it. For example. In the Twenty-sixth year of K. Henry II (1179), several Gilds in London were amerced to the Crown as Adulterine, that is, as set-up without Warrant from the King."<sup>1</sup>

In his chapter "De Libertates" Bracton puts the case that the king should grant some liberty "ut si alicui universitati, sicut civibus vel burgensibus vel aliquibus aliis q. mercatum habeant."<sup>2</sup> It appears, from the chapter as a whole, that he considered this liberty, or franchise, together with various other liberties, to be under the control of the king ("in manu sua"); and that private persons might enjoy it, "sed de gratia ipsius Regis speciali."

Y. B., 49 Edw. III, 3 (1375). A devised lands to B for life, remainder "a deux des meliour homes de la Guild de la Fraternity de Whittawyers en Londres" forever. A died without heirs, and on the death of B the king claimed the land by escheat. The court held that the devise (after B's life estate) was void. Belknap expressed his opinion that, even if the devise had been to "the Fraternity," it would not have been good, because the commonalty of London cannot by their own act create a community within the community without the charter of the King. . . . A Fraternity is not a term known to the law, nor can a community exist without a charter.<sup>3</sup> Knyvet, Chancellor, with greater

<sup>1</sup> Firma Burgi, 26.

<sup>2</sup> Lib. II, c. xxiv, fol. 56.

<sup>3</sup> "Le comen de Londres ne poet my d'eux mesme faire comen deins cest comen sans chartr le Roy. . . . Fraternity n'est my terme de ley, ne comen ne puit my estre sans chre."

precision of thought, said that this commonalty of the gild, which is not confirmed by the king, could not be adjudged a body capable of taking an estate by purchase.<sup>1</sup>

Y. B., 20 Edw. IV, 2 (1480). B, alderman of the X gild, brought debt against C, and counted upon an obligation made to A, sometime alderman of the gild, and his successors. Objection that the plaintiff had not shown how the corporation was formed. Objection sustained. Littleton took a distinction between a "corporation of common right" and a gild. The judges were all of opinion that, if suit could be maintained, it would be by the executor of A, and counsel for the plaintiff finally remarked that he had told his client so in the beginning.<sup>2</sup>

In Y. B., 14 Hen. VIII, 2 (1522), Fineux remarked: "There is a corporation by the Pope alone, as those mendicant brothers who cannot purchase." But Brooke, writing after the Reformation, laid it down that if the Pope purports to create a corporation, "ideo ceo est usurpation et voyd a cest jour et fuit imperpetuum."<sup>3</sup>

These authorities show that from a very early date the sovereign asserted that he, and he alone, could lawfully authorize men to act as a unit. Action by a number of men as a unit, without his authority, was an encroachment upon his prerogative.

In the main, this assertion was supported by the courts. A gild, in many respects, was like a modern town,<sup>4</sup> and it is easy to see why the courts should acquiesce in the sovereign's assertion of control over such bodies. And the law with respect to gilds became the law generally. The doctrine of corporations at the common law was confined within narrow limits — was regarded as an historical exception to the general rule. The claim by the city of London of a right to incorporate was never sanctioned; the claim of the Pope was certainly not sanctioned after the Reformation. We find Blackstone laying it down that the sovereign's consent is absolutely necessary to the erection of any corporation. Such consent, he explains, is implied with respect to corporations at the common law.<sup>5</sup>

In the United States the courts have taken a position similar to that of Blackstone.<sup>6</sup> It has been accepted, as clear and long-settled

<sup>1</sup> "Il ne poet pas estre p. la ley q. c. cominalty de la Guilde, q. n'est affirme p. chre le Roy, purroit estre adjudgee un corps de purchace estate."

<sup>2</sup> See also Y. B., 22 Edw. IV, 34.

<sup>3</sup> 1 Brooke, Abr. Corp., 33. See, accord, Dyer, 81, pl. 64.

<sup>4</sup> "And it was well observed, that in old time the inhabitants or burgesses of a town or borough were incorporated when the King granted to them to have *gildam mercatorium*." 10 Coke, 30 a. And see Madox, Firma Burgi, 29.

<sup>5</sup> 1 Bl. Comm. 460.

<sup>6</sup> Corporations at the common law have been but rarely mentioned in American corporate law. The validity, however, of a corporation aggregate at the common law was recognized by the United States Supreme Court, speaking by Mr. Justice Story, in *Terrett v. Taylor*, 9 Cranch, 43, 46 (churchwardens), and in *Pawlet v. Clark*, 9 Cranch, 292, 328 (same). The validity of a corporation sole at common law was recognized in the cases just cited (parson), and in *Governor v. Allen*, 8 Humph. (Tenn.), 176 (governor of a state). As to a corporation sole by virtue of a statute, see *Weston v. Hunt*, 2 Mass. 500 (parson); *Brunswick v. Dunning*, 7 Mass. 445 (parson); *Jansen v. Ostrander*, 1 Cow. (N. Y.), 670, 679 (a town officer was a corporation "by implication from the act creating the office").



law, that, without the consent of the state, corporate action is unauthorized.

It follows that if the state complains, in a *quo warranto* or similar proceeding, of unauthorized corporate action, the courts will grant the state appropriate relief. This is clear law.

But suppose that the state does not complain. Ought the courts to allow the question of legal incorporation to be raised collaterally? Is the assumption of the corporate privilege equivalent to a grant of the corporate privilege until the state intervenes?

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*St. 6 George I, c. 18, §§ XVIII and XIX (1719).*

XVIII. And whereas it is notorious, that several undertakings or projects of different kinds have, at some time or times since the four and twentieth day of June one thousand seven hundred and eighteen, been publicly contrived and practised, or attempted to be practised, within the city of London and other parts of this kingdom, as also in Ireland, and other his Majesty's dominions, which manifestly tend to the common grievance, prejudice, and inconvenience of great numbers of your Majesty's subjects in their trade or commerce, and other their affairs; and the persons who contrive or attempt such dangerous and mischievous undertakings or projects, under false pretences of public good, do presume, according to their own devices and schemes, to open books for public subscriptions, and draw in many unwary persons to subscribe therein towards raising great sums of money, whereupon the subscribers or claimants under them do pay small proportions thereof, and such proportions in the whole do amount to very large sums; which dangerous and mischievous undertakings or projects do relate to several fisheries, and other affairs, wherein the trade, commerce, and welfare of your Majesty's subjects, or great numbers of them, are concerned or interested: and whereas in many cases the said undertakers or subscribers have, since the said four and twentieth day of June one thousand seven hundred and eighteen, presumed to act as if they were corporate bodies, and have pretended to make their shares in stock transferable or assignable, without any legal authority, either by act of parliament, or by any charter from the crown for so doing; and in some cases the undertakers or subscribers, since the said four and twentieth day of June one thousand seven hundred and eighteen, have acted or pretended to act under some charter or charters formerly granted by the crown for some particular or special purposes therein expressed, but have used or endeavored to use the same charters for raising joint stocks, and for making transfers or assignments, or pretended transfers or assignments for their own private lucre, which were never intended or designed by the same charters respectively;

and in some cases the undertakers or subscribers, since the said four and twentieth day of June one thousand seven hundred and eighteen, have acted under some obsolete charter or charters, although the same became void or voidable by non-user or abuser, or for want of making lawful elections, which were necessary for the continuance thereof; and many other unwarrantable practices (too many to enumerate) have been, and daily are and may hereafter be contrived, set on foot, or proceeded upon, to the ruin and destruction of many of your Majesty's good subjects, if a timely remedy be not provided: and whereas it is become absolutely necessary, that all public undertakings and attempts, tending to the common grievance, prejudice, and inconvenience of your Majesty's subjects in general, or great numbers of them, in their trade, commerce, or other lawful affairs, be effectually suppressed and restrained for the future, by suitable and adequate punishments for that purpose to be ascertained and established: now for suppressing such mischievous and dangerous undertakings and attempts, and preventing the like for the future, may it please your most excellent Majesty, at the humble suit of the said lords spiritual and temporal and commons, in this present parliament assembled, that it may be enacted; and be it enacted by authority of this present parliament, that from and after the four and twentieth day of June one thousand seven hundred and twenty, all and every the undertakings and attempts described, as aforesaid, and all other public undertakings and attempts, tending to the common grievance, prejudice, and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public subscriptions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all other matters and things, whatsoever, for furthering, countenancing or proceeding in any such undertaking or attempt, and more particularly the acting or presuming to act as a corporate body or bodies, the raising or pretending to raise transferable stock or stocks, the transferring or pretending to transfer or assign any share or shares in such stock or stocks, without legal authority, either by act of parliament, or by any charter from the crown, to warrant such acting as a body corporate, or to raise such transferable stock or stocks, or to transfer shares therein, and all acting or pretending to act under any charter, formerly granted from the crown, for particular or special purposes therein expressed, by persons who do or shall use or endeavor to use the same charters, for raising a capital stock, or for making transfers or assignments, or pretended transfers or assignments of such stock, not intended or designed by such charter to be raised or transferred, and all acting or pretending to act under any obsolete charter become void or voidable by non-user or abuser, or for want of making lawful elections, which were necessary to continue the corporation thereby intended, shall as to all or any such acts, matters, and things, as shall be acted, done, attempted, endeavored, or proceeded upon, after the said four

and twentieth day of June one thousand seven hundred and twenty) forever be deemed to be illegal and void, and shall not be practised or in any wise put in execution.

xix. And be further enacted by the authority aforesaid, that from and after the said four and twentieth day of June one thousand seven hundred and twenty, all such unlawful undertakings and attempts, so tending to the common grievance, prejudice, and inconvenience of his Majesty's subjects, or a great number of them, in their trade, commerce, or other lawful affairs, and the making or taking of any subscriptions for that purpose, the receiving or paying of any money upon such subscriptions, the making or accepting of any assignment or transfer, or pretended assignment or transfer, of any share or shares upon any such subscription, and all and every other matter and thing whatsoever, for furthering, countenancing, or proceeding in any such unlawful undertaking or attempt, and more particularly the presuming or pretending to act as a corporate body, or to raise a transferable stock or stocks, or to make transfers or assignments of any share or shares therein, without such legal authority, as aforesaid, and all acting or pretending to act under any charter formerly granted from the crown for any particular or special purposes therein expressed, by persons making or endeavoring to make use of such charter for any such other purpose not thereby intended, and all acting or pretending to act under any such obsolete charter as is before described, and every of them (as to all or any such acts, matters or things as shall be so acted, done, attempted, endeavored or proceeded upon, after the said four and twentieth day of June one thousand seven hundred and twenty) shall be deemed to be a public nuisance, and nuisances, and the same, and all causes, matters, and things relating thereto, and every of them, shall forever hereafter be examined, heard, tried, and determined as common nuisances are to be examined, heard, tried, and determined by or according to the laws of this realm; and all offenders therein, being thereof lawfully convicted upon information or indictment, in any of his Majesty's courts of record at Westminster, or in Edinburgh, or in Dublin, shall be liable to such fines, penalties, and punishments, whereunto persons convicted for common and public nuisances are, by any of the laws and statutes of this realm, subject and liable; and moreover shall incur and sustain any further pains, penalties, and forfeitures, as were ordained and provided by the statute of provision and præmunire made in the sixteenth year of the reign of King Richard the Second.

*Whoever procures at Rome or elsewhere any translations, process  
es excommunicatus instruments or other things which obstruct, or them  
the crown realm... shall be put out of the King's protection their lands  
& goods forfeited to the King's use wher they shall be attached their bodies to  
answer to the King this Council*

5<sup>D</sup> DUVERGIER v. FELLOWS.

1828. 5 Bingham, 248.

DEBT on a bond, conditioned for paying plaintiff £10,000, upon his forming a company and procuring purchasers for shares therein. The plea stated, among other things, that it was the intent of the parties that the company should be formed for the purpose of acting as a corporate body and of having transferable shares, — and this without charter from the king. A demurrer to this plea was overruled.

BEST, C. J., said, on this point: The seventh plea states, and the demurrer admits, that the plaintiff and the defendant intended that the company which the plaintiff undertook to form should act as a corporate body without any charter from the king, and that the benefit of the letters patent were to be enjoyed by this pretended corporate body, and that the capital of this body was to be divided into 10,000 shares, which were to be *transferable* and *assignable*.

It has been said at the bar, that the parties might intend to obtain an act of parliament to give this body a legal existence. Nothing of this intention appears on the record.

It has been further said, that the defendant should have shown how the parties intended to act as a corporation. If this is not correctly pleaded, advantage should have been taken of the technical defect by special demurrer. If what they intended to do would not have been acting as a corporation, they should have traversed the plea. By demurring, the plaintiff has confessed himself guilty of intending to form a company that was to act as a corporation.

But the shares were to be transferable. There can be no transferable shares of any stock except the stock of corporations, or of joint-stock companies created by acts of parliament. When it is said the shares were to be transferable, that must mean, that the assignee was to be placed in the precise situation that the assignor stood in before the assignment; that the assignee was to have all the rights of the assignor, and to take upon him all his liability. Now the assignee can join in no action for a cause of action that accrued before the assignment. Such rights of action must still remain in the assignor, who, notwithstanding he has retired from the company, will still remain liable for every debt contracted by the company before he ceased to be a member. Indeed, the members of corporations cannot assign their interest, and force their assignees into the corporation, without the authority of an act of parliament. Such authority is expressly given by the bank acts, the South-Sea acts, and by other statutes creating companies that possessed stock, which it was deemed proper to be rendered transferable.

The pretending to be possessed of transferable stock is pretending to act as a corporation, and pretending to possess a privilege which

does not belong to many corporations. But this is put only as one of the proofs of the intention of the projectors of this company that it should act as a corporation. It is not necessary on these pleadings to decide whether the forming a company with such shares is of itself, without other circumstances, pretending to act as a corporation; because, it is by the pleadings distinctly admitted, that the plaintiff and defendant intended that the company should act as a corporation. Persons who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of a king, by usurping on his prerogative. By the 9th of Anne, c. 20, the court may not only give judgment of ouster, but may fine a defendant convicted on a *quo warranto*. This shows that the usurpation is considered as a criminal act. But it has been insisted, that the usurpation is only criminal where a party, without authority, acts in a public office, and that the pretended corporation which these parties were to set up did not affect the public, but was a scheme with which certain individuals only were connected. Most of the statutes relative to *quo warrantos*, from the Statute of Gloucester down to the 9th of Anne inclusive, have the words *offices and franchises*. Franchises are privileges for the advantage of individuals. In *Com. Dig.* title *Quo Warranto*, many things are mentioned as matters for which *quo warranto* will lie, which are valuable only to the individuals who claim them against the crown, and are not connected with any public duty. But it concerns the public that bodies, composed of a great number of persons with large disposable capitals, should not be formed without the authority of the crown, and subject to such regulations as the king in his wisdom may deem necessary for the public security.

The acting as such a corporation, without charter from the crown, is contrary to law, and no man can maintain an action on a bond given to secure payment of a compensation to the obligee for the formation of any such pretended corporations. For these reasons, judgment must be for the defendant.

12/37.25t. 323, 325.

CALLENDER v. PAINESVILLE & HUDSON RAILROAD CO.

1860. 11 Ohio State, 516.<sup>1</sup>

ERROR to the Court of Common Pleas of Cuyahoga County. Reserved in District Court.

Plaintiffs filed petition to recover debt and damages claimed under a written contract of defendant, an incorporated company, executed on the part of the company by Van R. Humphrey, as its president.

George W. Steele filed a motion to dismiss; stating that he was a member and secretary of the company, denying the validity of the service of the summons, and alleging that said company is not a corporation. The Court of Common Pleas dismissed the action, holding that, in view of the defects in the certificate of organization under the general statute, the defendant was not a duly organized corporation or liable to be sued as such.

SUTLIFF, J. [After considering the question as to the validity of the certificate, and intimating that the only objection to it raised by counsel was untenable.]

But in this case the original petition alleged that the defendant was a corporation. The contract upon which the action was brought, a copy of which was appended to the petition, purported to be executed by the defendant, as a corporation; and the motion and the affidavit of the mover, disclosed, at most, only a defect in the act of incorporation. But the affidavit admits that the company had attempted in all respects to comply with the requisitions of the statute, and in fact obtained, by a supposed compliance on their part, the acceptance and record of their certificate by the secretary of state, a copy of which was to them a valid charter, as they supposed.<sup>3</sup> And the affiant further states that he had acted as their secretary for some three years, and that the president of the company was then residing at Painesville, where the company then kept its office.

It thus appears that the members of the company obtained their charter, supposed themselves a legally incorporated company, and had continued to hold themselves out, and to act as such, to and with the public, and are still so acting. Nor is there any denial, either in the motion or affidavit of Steele, that their president, Humphrey, was not authorized by himself and others of the association, to execute said contract on behalf of the association, as an incorporated company.

Under such circumstances, the members of the company, and especially the officers of the company, are estopped to deny its existence as a corporation. However mistaken in fact, no person, whether artificial or natural, is permitted to so conduct and represent himself as to induce reasonable men, at his instance, to act upon the truth of such representations in their contracts and dealings with him, and to then deny the

<sup>1</sup> Only so much of the case is given as relates to one point. — Ed.

Sued vs. Assn  
as Co.  
Co acts updr

Uncertainty of disc  
direct from me  
State me as such

Enlightened  
rejoice

truth of such representations, to the prejudice of the party so having relied upon them.

In order for the company, or any member thereof, to so repudiate its conduct, and disprove the truth of its own representation, it is necessary for it, not only to show an honest mistake, but that such mistaken representation had not induced the adversary party, in the exercise of reasonable prudence on his part, to give the credit, make the contract, and act under it in confidence of the truth of such conduct and representations.

But in this case, not only has the association obtained a copy of the certificate, its charter of incorporation, and represented itself to the other party to be a corporation, by making the contract in that capacity, but it has continued to act in a corporate capacity down to the time of filing the motion; and the member so filing the motion states that he is still the officer of the corporation. It thus appears that, instead of contradicting the misrepresentation, before the contract was made, the company had not, even after making the contract, either in conduct or representation, ever denied their corporate character.

Under such circumstances, to suffer the defendants to repudiate their first conduct, and deny the truth of their representations, by which the plaintiffs had been induced to contract with them, and upon which both parties had acted, would be in contravention of those principles of equity upon which the doctrine of estoppel rests, and its operative effect to prevent fraud depends.

We are, therefore, clearly of opinion that, at the time of the hearing of the motion, the company and its members who had so held themselves out to be a corporation, were estopped to deny that fact, for any defect whatsoever, if the same had in fact existed in their charter.

The judgment of the court of common pleas must, therefore, be reversed, and the cause remanded. *Judgment accordingly.*

SCOTT, C. J., and PECK, GHOLSON and BRINKERHOFF, JJ., concurred

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32 BOYCE v. TRUSTEES OF TOWSONTOWN STATION OF  
THE M. E. CHURCH.

1877. 46 *Maryland*, 359.<sup>1</sup>

*Assumpsit* against an alleged religious corporation. Defendants appeared by counsel, and pleaded, 1st, that the defendants are not and never were a body corporate, as alleged. Plaintiff offered in evidence an agreement or certificate of incorporation under a general statute. The statute required this document to be acknowledged before two Justices of the Peace, or a Judge of the Circuit Court or of the Supreme Bench of Baltimore. It was acknowledged before a single Justice of the Peace. Statement abridged. Arguments, and part of opinion, omitted. — Ed.

the Peace. Plaintiff, to show user of the corporate name and franchise, offered in evidence a deed of land to said Trustees; and a mortgage from said Trustees to Crook and Hiss, Trustees.

All the above evidence was rejected, and plaintiff excepted. Verdict and judgment for defendants. Plaintiff appealed.

*Wm. A. Fisher and Orville Horwitz*, for appellant.

*Arthur W. Machen*, for appellee.

STEWART, J. . . . But the appellant has undertaken to offer evidence of certain acts and proceedings of the appellee, referred to in the exceptions, to show that it held itself out as a corporation, and treated with the appellant as such, and is estopped from denying its liability as a corporation.

*Small C H. a co. p.*

We think it would be extending the doctrine of *estoppel* to an extent, not justified by the principles of public policy, to allow it to operate through the conduct of the parties concerned, to create substantially a *de facto* corporation, with just such powers as the parties may by their acts give to it.

This would be substituting the dealings of the parties, for compliance with the requirements of the law, and giving to them the same effect through the aid of the Courts. Thus, virtually, through the Courts, recognizing the existence of the corporation, in manifest disregard of the written law.

It has been determined by this Court, that a corporation cannot bind itself in excess of its powers. *Penna. Steam Navigation Co. vs. Dandridge*, 8 G. & J., 319.

Whilst denying its capacity upon any principle of estoppel, to make contracts *ultra vires*, to bind itself; it would not be consistent with that theory to recognize its *existence ad libitum*, according to the conduct of the parties concerned.

Such a principle would seem to affix no other limit to the existence of the corporation *de facto*, or the extent of its power than the dealings of the parties, through the recognition of the Courts, might, upon the doctrine of estoppel, prescribe.

It would be more reasonable to hold corporations to their contracts, though *ultra vires*, of which they have received the benefit, or to prevent parties who have contracted with them, and received the benefit therefrom, from defeating their liability, on the ground of want of power in the corporation, as is held in quarters of high authority, (see note and references in *2nd Kent*, 351,) than to hold that corporations should be deemed to have existence, because they had so held themselves out.

The statute law of the State, expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law, and clearly against its policy, and justified upon no sound principle in the administration of justice.

*Judgment affirmed.*

*Why require corp to make C when it is asked to enforce? "Because public policy demands that corp activity shall be confined within defined limits." Yes but why else force upon to vindicate rights & public in this suit. Why shdn state deal w corp as a power of constituted to enforce the restriction.*



## 3 SLOCUM v. PROVIDENCE STEAM AND GAS PIPE CO.

1870. 10 *Rhode Island*, 112.<sup>1</sup>

## SLOCUM v. WARREN.

1871. 10 *Rhode Island*, 116.<sup>1</sup>

*Bill* in equity, praying that defendants might be enjoined from selling plaintiff's land under executions recovered by them against the American Steam and Gas Pipe Co. The plaintiff was found by the Court to be a stockholder in the latter Company. Chapter 128, Rev. Stat., provides that every manufacturing company shall annually file a certain certificate; and that, if any of said companies shall fail so to do, all the stockholders of said company shall be jointly and severally liable for all the debts of the company then existing. It appeared that one, at least, of the creditors, Elizabeth Warren, made a loan to the Company, relying for repayment not only upon the credit of the Company, but also upon the personal liability of the stockholders, and of the plaintiff especially as one of them. Plaintiff contends that he is not subject to any such liability, for the reason that the American Steam and Gas Pipe Company never had any legal existence as a corporation.

*Bradley and John Eddy*, for plaintiff.

*B. N. & S. S. Lapham, James Tillinghast and Cobb*, for defendants.

DURFEE, J. [in *Slocum v. Providence &c. Co.*]. . . . The charter, or act of incorporation, for the American Steam and Gas Pipe Company, was granted or passed in 1867, the capital named in the charter or act being seventy-five thousand dollars. At that time, there was in force in the state a public statute which provided that no act of incorporation granted after the passage thereof, "for any other than for religious, literary, charitable, or cemetery purposes, or for a military or fire company, shall take effect until the persons therein incorporated shall have paid to the general treasurer the sum of one hundred dollars, if the capital limited by such act of incorporation is the sum or any less sum than one hundred thousand dollars." The hundred dollars, required by this statute, was not paid for the American Steam and Gas Pipe Company, and consequently, their act of incorporation never went into effect, if it is to be construed as passed subject to the statute. We think it is to be so construed, there being no clause of the act excepting it out of the operation of the statute. See *The Union Horse Shoe Works v. Lewis*, 1 Abbott U. S. 518.

The defendants contend that, even if the act has never gone into effect, the existence of the company as a corporation cannot be questioned in a collateral proceeding. It is undoubtedly the rule that, if a charter has once been duly granted and accepted, the state alone can

<sup>1</sup> Statement abridged. Only portions of the opinions are given. — D.

enforce a forfeiture of the charter for any violation thereof, or failure to comply with its considerations on the part of the corporation; and that, until the state sees fit to enforce the forfeiture, the corporation is to be recognized as legally existing in all collateral proceedings. But here, the act of incorporation being inoperative, there never was any corporation to incur a forfeiture, or any charter to be forfeited. We know of no rule which precludes inquiry into the question, whether a company which assumes to act as a corporation has ever been incorporated, in any case, in the absence of any matter of estoppel to prevent the inquiry.

But the plaintiff, in order to have the relief which he seeks, ought to satisfy us, not only that his company is not a corporation, but also that he is entitled to show the fact as against its creditors. We assume, as we think the bills warrant us in assuming, that the plaintiff is a stockholder in the American Steam and Gas Pipe Company, though he has done nothing as such, except hold his stock. The question then is, whether a stockholder, who does nothing but hold his stock, is estopped, when pursued by a creditor of the supposed corporation, from denying its existence. We think he is so estopped. By becoming and continuing a stockholder, he holds himself out as a corporator, and so contributes to the belief that the company with which he is associated is a corporation. To permit a person who has so held himself out to say that he is not a corporator, when legally pursued as such, would be to permit him to take advantage of his own wrong. He is like a person who, having held himself out or suffered himself to be held out as a copartner, may be charged with the copartnership debts. Or he is like a person who, without authority, as executor or administrator, intermeddles with the property of a decedent, and so becomes chargeable as an executor in his own wrong. The plaintiff having assumed the character of a corporator, where he is sought to be charged as such, ought not to be heard to say that the character was falsely or unlawfully assumed. The fact that he was not active in the business of the company cannot avail him; for it is the assumption to hold the stock as if he were a corporator, which makes the mischief. It might easily happen that the stockholder, whose name contributed most to the credit of the supposed corporation, was least active in its business, and it would be plainly unjust to exempt him from liability to the creditors, merely because of his inactivity.

We are aware that in *Utley v. Union Tool Company*, 11 Gray, 139, the Supreme Court of Massachusetts exempted a stockholder from liability to a creditor of a supposed corporation, upon proof that the corporation had never legally come into being under the statute of that state. But it does not appear that in that case the question of estoppel was raised by the counsel or considered by the court. We should agree entirely with the Supreme Court of Massachusetts in their decision in any case in which the estoppel would be inapplicable.

Can we say  
anticipatory  
in collateral  
?

Should not  
be a corporation  
?

Should not  
be a corporation  
?

DURFEE, J. [In *Slocum v. Warren*]. . . We decided in the former case that having, by becoming a stockholder, helped to hold the company out as a corporation, he could not be permitted to say, when pursued by a creditor of the company, that he and his associates or predecessors had omitted to do an act which they ought to have done before organizing as a corporation, and that in consequence of this delinquency the company was not (what it purported to be) a legally established corporation. The plaintiff maintains that this decision was erroneous, and in support of his view, relies especially upon the cases of *Hudson v. Carman*, 41 Maine, 84; *Unity Insurance Company v. Cram*, 48 N. H. 636; *Uiley v. Union Tool Company*, 11 Gray, 139; and *Gardner v. Post et al.* 43 Pa. St. 19. We propose to consider these and some of the other cases bearing upon the question, somewhat in detail.

[After commenting on various authorities, the opinion proceeds.]

The plaintiff also cites cases in which it has been held that a corporation duly established as such is not estopped from denying its liability where there is a want of power to contract the liability, the reason being, he says, that otherwise the powers of the corporation might be indefinitely enlarged; and he argues that, in the case at bar, the doctrine of estoppel is still less applicable, inasmuch as the company was acting not merely in excess of its corporate powers, but without any corporate power whatever. But in the case at bar, the defect of power exists not by reason of any insufficiency of the grant, but by reason solely of a delinquency on the part of the grantees of the power; and the estoppel, if applied, would be applied not to prevent an appeal to the charter to show a want of authority, but to prevent the introduction of evidence by the company or its members to prove their own delinquency. We do not think that in such a case there should be any hesitation to apply the doctrine of estoppel from fear that it would lead to an indefinite enlargement of the powers of the corporation. And see *Bargate v. Shortridge*, 5 H. L. Cas. 297, 318; *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad Company et al.* 23 How. U. S. 381.

[After citing and commenting upon other authorities, the opinion proceeds.]

It is true these cases are not precisely like the case at bar, but they are cases which illustrate the application of the law of estoppel in respect to corporations, or companies acting as corporations, or which illustrate to what extent the corporate existence of a company acting as a corporation can be collaterally questioned. And we think it is safe to say upon the authority of these cases, that at least where there is an act or charter in existence, under which a company by taking the proper steps can become a corporation, if a company does *de facto* organize and hold itself out as a corporation, contracting obligations as such, it cannot, when sued upon such obligations, by persons who have dealt with it as such in good faith, be permitted to avoid a corporate

liability thereon, by setting up that it has not taken all the steps prescribed as conditions precedent to its legal existence as a corporation. If this be so in regard to the company as a whole, we do not see why it is not equally so in regard to each member of the company individually, in so far as membership imports an individual liability. In this case, it is said there was no act or charter; but in our opinion there was a charter duly granted by the legislature, subject only to a condition that it should not take effect until a certain act should be performed; but inasmuch as this act could have been performed, as it ought to have been performed, by the grantees of the charter before their organization as a corporation, the case does not, in our view, substantially differ from cases which are clearly within the rule above stated. Indeed it is frequently the case that a charter is granted subject to an implied condition, that the grant shall not take effect until it has been duly accepted; and yet, as we have seen, the doctrine of estoppel may be applied to prevent the want of such an acceptance from operating to defeat a just claim. *Camp v. Byrne, supra*; and see *Tobacco Pipe Makers' Co. v. Woodroffe*, 8 D. & R. 30, cited in Abbott's Dig. Law of Corp. p. 831, § 23. In this case the company had only to pay into the treasury of the state one hundred dollars, and all would have been right. When it organized as a corporation, and from year to year continued doing business as such, it as much as said, and each one of the stockholders as much as said, that that sum had been paid; and now neither the company nor any one of the stockholders ought to be heard to assert the contrary in order to escape any liability to which he or it would have been subject if the payment had been duly made. 4650.360.

This decision is doubtless a hard decision for the plaintiff, and we very much regret that his situation is such that he is so severely affected by it. But hard as the decision is for the plaintiff, it only subjects him to the liability to which he would have been subjected if the tax due the state had been paid, as it ought to have been paid, and therefore only to the liability which, as an honest man, he must be presumed to have intended to incur when he connected himself with the company.<sup>1</sup> [Plaintiff's prayer denied.]

<sup>1</sup> The statute under consideration in the above case was repealed by the Rhode Island General Statutes of 1872; and the following provision substituted: "No corporation shall be organized under a charter, until the petitioners . . . shall pay into the general treasury for the use of the State, one hundred dollars." In *Hughedale Mfg. Co. v. Vanner*, 12 R. I. 491 (an action of assumpsit by the corporation), it was held, that, under the later statute, the failure to make the payment would be taken advantage of only by the State, and did not avail the defendant as a valid objection to the plaintiff's corporate existence. The Court said, that the payment prescribed by the later statute was not, like that prescribed by the earlier statute, a condition precedent to the existence of the corporation; but something required to be after the charter has gone into effect, and, if the charter is in the usual form, after the corporation has been created. — ED.

## \*UTLEY v. UNION TOOL COMPANY.

1858. 11 *Gray (Mass.)*, 139.

ACTIONS OF CONTRACT against the Union Tool Company, described in the writs as "a corporation established according to law in Goshen," in the county of Hampshire. The principal defendants were defaulted; and several persons were summoned in as stockholders, pursuant to the St. of 1851, c. 315, and filed answers, upon which trials were had in the court of common pleas in Hampshire.

The plaintiffs proposed to prove by the records of the Union Tool Company that the respondents were stockholders therein. The respondents objected to the admission of this evidence before the existence of the corporation had been shown, and unless it was shown that it was a manufacturing corporation whose stockholders might become liable as such for its debts. Morris, J., ruled that it was not necessary for the plaintiffs to prove the existence of the corporation, that being admitted by the default, but that it was necessary to show that it was such a corporation that its stockholders might become individually liable; and admitted evidence that the company had made by-laws and done other acts as a corporation, and the respondents had attended meetings as stockholders; without proof that the company had ever been incorporated by the legislature, or by articles of association in writing, setting forth the amount of the capital stock, and the purpose of their establishment, as required by St. 1851, c. 133, §§ 1-3. Verdicts were taken for the plaintiffs, and the respondents alleged exceptions. The other facts sufficiently appear in the opinion.

These cases were argued at Northampton in September, 1858, and decided at Boston in April, 1860.

*W. Allen, Jr.*, for the respondents.

*C. Delano & S. T. Spaulding*, for the plaintiffs.

BIGELOW, J. There can be no doubt that the burden of proof was on the plaintiffs to show the legal existence of a corporation of which the persons summoned in the action were members and for the debts of which they were personally liable. This is the precise issue which, by St. 1851, c. 315, § 2, it was intended should be open to a stockholder on his being admitted to defend the action as therein provided. It is to be made to appear that he is liable in the action; otherwise, he is entitled to judgment in his favor "upon the issue joined." It has already been determined that under this provision an alleged stockholder cannot be allowed to make a general defence to an action against a corporation, by calling in question the validity of the debt which is sought to be recovered, or disputing the amount averred to be due, but that he has a right to a hearing and adjudication on the question whether he is a member of a corporation and liable as such for its debts. *Holyoke Bank v. Goodman Paper Manuf. Co.*, 9 Cush.

582. It is obvious that the trial of the issue which is thus opened to an alleged stockholder necessarily involves the question of the legal existence of the corporation for the debt of which he is sought to be charged, because his liability depends on the nature of the corporate body and of the powers and duties with which it was clothed by law. Until these are shown, it cannot be known whether the stockholder is legally chargeable or not. Doubtless there may be cases where the existence of a corporation and the character and description of its functions and privileges may be shown by prescription or long user. In such case a charter or legislative grant of corporate powers may be presumed. But no such inference or presumption can exist in the present cases, nor do the plaintiffs attempt to maintain their claims to charge the persons summoned on any such ground. On the contrary their whole case rests on the allegation that the respondents are liable as stockholders in a corporation created and established under the recent statute entitled "an act relating to joint stock companies." St. 1851, c. 133. But it seems to us that the evidence offered at the trial fails to show that the alleged corporation ever had any legal existence. By reference to the first section of the statute, it will be found that, in order to establish a corporation under it, it is necessary that not less than three persons should enter into "articles of agreement in writing," for the purpose of carrying on business of the nature specified in the statute. By these articles, it is provided in §§ 2 and 3, the amount of the capital stock shall be fixed and limited, and the purpose for which and the place in which the corporation is to be established shall be distinctly and definitely set forth. By § 4, it is further provided that, before commencing business, a certificate shall be made of the name, purpose, capital stock, and other particulars concerning the constitution and objects of the corporation, to be published and recorded as therein required. And by § 5 it is provided that "when such persons are organized as aforesaid" — that is, by articles of agreement, as above set forth — "they shall become a corporation, with all the powers and privileges and subject to all the duties, restrictions, and liabilities set forth in the thirty-eighth and forty-fourth chapters of the revised statutes." There can be no doubt of the construction which ought to be given to these provisions. The implication is clear and unavoidable that, until the organization is completed according to the requirements of the statute, the association does not become a corporation, and does not possess corporate rights or privileges, nor is it subject to the duties and liabilities of a manufacturing corporation, among which is the liability of the stockholders for corporate debts, if certain provisions of law are not complied with. There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorpora-

tion, by which corporate rights and privileges are usually granted. If there were no such requirement, there would be an absence of any provisions by which the right to exercise corporate power could be definitely fixed and established, and there would be no means of ascertaining the rights of stockholders or of persons dealing with such associations.

Upon an examination of the evidence adduced at the trial, there is nothing to show that any articles of agreement were ever entered into for the formation of a corporation under the statute. That some organization took place with a view to establish a corporation is abundantly shown. But the essential fact is wanting to show that the persons engaged in the enterprise ever complied with the condition precedent to their right to assume the name and functions of a corporation. It is not a case of a defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being, which had the power of contracting debts or of rendering persons liable therefor as stockholders.

We are not called on now to say whether the plaintiffs have any remedy for the collection of their debt against those who participated in the transactions connected with the attempted organization of the supposed corporation. It is sufficient for the decision of this case, that the respondents cannot be held liable in the action for the debts of a corporation which has never had any legal existence.

*Exceptions sustained.*

## 5 BUSHNELL v. CONSOLIDATED ICE MACHINE CO.

1891. 138 Illinois, 167.<sup>1</sup>

SUIT in chancery to have the Consolidated Ice Machine Co. declared a copartnership, and its affairs settled between the complainant and defendants accordingly. In the court below, the demurrer was sustained and the bill dismissed.

The following facts appear from the bill: In 1884 the complainant and the individual defendants entered into a written agreement to form a corporation, with the above title, under the laws of the State; all the required steps were taken, up to and including the issuing of a certificate of the complete organization of such corporation by the Secretary of State; complainant was a director; and for several months secretary and soliciting agent, actively engaged in its business. In 1885 complainant became afflicted with *melancholia* and remained incapacitated for the transaction of business for about three years. During his sickness, the other directors sold some of his shares for non-payment of installments, the sale being without notice. Since the sale he has been excluded from all participation in the

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

management of the business. After being restored to health, and before filing his bill, he made frequent demands to be restored to his rights in said corporation, but without avail.

The only allegation of the bill which is seriously insisted upon as furnishing a ground for the relief prayed is, that the certificate of complete organization, issued by the Secretary of State was never recorded in the office of the recorder of deeds in the county where the principal office of the company was located. The statute requires that "the same shall be recorded" in that office.

WILKIN J.

But assuming that a corporate existence *de jure* depends upon the filing of the certificate of complete organization in the office of the recorder of deeds of the county in which its principal office is located, and that the bill properly avers that it was not done in the case of the corporation in question, it by no means follows that it did not become a corporation *de facto* as between the complainant and defendants. From the facts set up in the bill it clearly appears that there was an honest attempt by the incorporators to organize a corporation authorized by the laws of this State. The necessary steps to perfect that organization were all taken as required by the statute, except that the final certificate was not recorded. It is shown by the bill that upon the issuing of that certificate its directors elected the proper officers and proceeded to the transaction of business as a corporation, and continued to act as such until the filing of this bill, a period of more than five years. That these facts establish a corporation *de facto* is settled by numerous decisions of this court. *President and Trustees, etc. v. Thompson*, 20 Ill. 198; *Rice v. R. I. and A. R. R. Co.* 21 id. 93; *Baker et al. v. Administrator*, 32 id. 79; *Ramsey v. Marine and Fire Ins. Co.* 55 id. 311; *Cincinnati, Lafayette and Chicago Railroad Co. v. Danville and Vincennes Ry. Co.* 75 id. 113; *Louisville, New Albany and Chicago Ry. Co. v. Shires*, 108 id. 617; *Hudson v. Green Hill Seminary Corporation*, 113 id. 618.

That plaintiff in error, if he had been sued by the Consolidated Ice Machine Company on his subscription to its capital stock, could not have questioned its corporate existence on the grounds alleged in his bill, is directly settled by several of the above cited decisions. It is equally clear that if, during the time he was a member of said corporation, it had been sued as such, neither he nor any other of its members could have been heard to say that no such corporation existed. The general rule is, that one who deals with a corporation as existing *de facto*, is estopped to deny, as against it, that it has been legally organized. It is the settled rule in this State that the legal existence of a corporation *de facto* can not be questioned collaterally. See cases *supra*, and *Remwick et al. v. Hall et al.* 84 Ill. 162; *The People ex rel. v. Trustees of Schools*, 111 id. 171; *Keigwin et al. v. Drainage Comrs.* 115 id. 347.

direct.  
Manufacturing

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It seems impossible to find a reason for placing the complainant in this bill in a more favorable position to deny the existence of the corporation in question than a mere subscriber to its capital stock, or one who, as a third party, had dealt with it as a corporation, and we are of the opinion that he could not do so in this collateral proceeding. He, however, not only seeks to question the legal organization of the corporation, but to have the same changed into a co-partnership between himself and the other incorporators, and to compel the defendants to account to him as his co-partners. "A partnership is never created between parties by implication or operation of law, apart from an express or implied intention and agreement to constitute the relation." (1 Bates on Law of Partnership, sec. 3.) In *Phillips v. Phillips*, 49 Ill. 437, CATON, C. J., said: "A partnership can only exist in pursuance of an express or implied agreement, to which the minds of the parties have assented." This rule will not prevent the enforcement of liability against persons as partners, when sued by third parties. "Parties may so conduct themselves as to be liable to third persons as partners, when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts, while the certain proof is positively known to the alleged parties to a firm." (*Phillips v. Phillips*, *supra*.) On this latter ground parties who have attempted to organize a corporation, but have failed to comply with the law, so as to perfect their incorporation, may be held liable as partners to creditors, as in *Bigelow v. Gregory et al.* 73 Ill. 197. This liability rests on the doctrine of estoppel. When, however, even a creditor has dealt with the corporation as such, partnership liability can not be enforced, even though the corporation has not been legally organized. *Tarbell v. Page*, 24 Ill. 46.

It is wholly unnecessary, however, in this case, to determine when and under what circumstances third parties may proceed against incorporators acting under a defective or imperfect organization, as individuals or co-partners. In this case the complainant shows by his bill that he was not only one of the incorporators of the company he now seeks to question, but that he was, upon its complete organization, elected its secretary and general agent, and acted as such for several months prior to his alleged disability, during which time he was actively engaged in assisting to carry on its corporate business, and that upon his being restored to health he still recognized its corporate existence, and sought to be restored to his rights therein. If the recording of the certificate in question was essential to the organization of the corporation, there is nothing in this bill to show that it was not as much his duty to have it done as either of the other incorporators. We are unable to perceive, then, upon what principle he can now compel those who, for anything appearing in this bill, honestly supposed they were incorporated during all the time the business mentioned in the bill was being carried on, to account to him, upon the

theory that they were his co-partners. In fact, if the allegation as to his mental condition at the time his stock was sold was omitted from the bill, it would strike any one as too clear for argument that he has failed to state a case entitling him to equitable relief, and it must, we think, be held, that whether that fact, together with the allegation that his stock was sold without notice and he ousted from all participation in the business of the company, would entitle him to his action for that alleged wrong, or to be restored to his former rights as a member of said corporation or not, no legal ground is shown by this bill for holding defendants liable to him as partners.

There is nothing in the case of *Flagg v. Stowe*, 85 Ill. 166, when the facts of that case are considered as they appear in that report, and in *Stowe v. Flagg et al.* 72 Ill. 397, contrary to the view here expressed. We have examined the numerous cases cited by counsel for plaintiff in error as giving support to the position that a corporation defectively organized may be treated as a co-partnership, and the members held liable as partners; but when it is borne in mind that complainant himself was a member of the corporation in question, and in no sense a third party, and that he is not seeking by this bill to recover for anything which he has been required to pay third parties for or on behalf of said corporation, they have no application. What he seeks to do is to have the corporation converted into a partnership, contrary to the contract of the parties, simply because he and other incorporators failed to perfect, as he says, the corporation. He does not even show that he has been misled or in any way injured by the failure to have the certificate of complete organization recorded. Neither does he pretend that the omission of any of the incorporators to have the same recorded was willful, or in any way designed to injure him or others.

Especially applicable  
in defective  
incorporation  
note in text

We can find neither authority nor reason to sustain this bill, and are clearly of the opinion that the decree of the circuit court is right.

*Decree affirmed.*

12/8/7-32 Oct 59,

Converse: The body assoc<sup>n</sup> can have no one - then take adv. of unincorp<sup>d</sup>  
character - assoc<sup>n</sup> members - Nelson & Co - 95 Much 451.

## JONES v. CINCINNATI TYPE FOUNDRY CO.

1860. 14 Indiana, 89.<sup>1</sup>

APPEAL from the Grant Circuit Court.

PERKINS, J. — Suit upon a promissory note.

"The Cincinnati Type Foundry Company, a corporation," &c., complains of David W. Jones, defendant," &c., upon a promissory note, of which a copy is set out thus:

"\$279. Indianapolis, Indiana, October 11, 1857.

"Six months after date, I promise to pay to the order of the Cincinnati Type Foundry Company, two hundred and seventy-nine dollars, for value received, without relief from valuation laws.

David W. Jones."

The defendant demurred to the complaint. The demurrer was overruled, and rightly.

The defendant then answered —

1. That he was not indebted to the plaintiffs.
2. That each and every allegation of the complaint was untrue.
3. That the plaintiffs had not a legal capacity to sue, because not a corporation.

Issue. Trial. The note constituted all the evidence. Judgment for the plaintiffs on the note.

The appellant contends that the case was not made out against him, because it was not proved that the appellees were a corporation, and thus possessed of the capacity to sue.

The appellees insist that the note sued on is a contract with them as a corporation, and that their existence is thereby admitted.

As a general proposition, it is the law of this state that a contract with a party as a corporation estops the party so contracting to deny the existence of the corporation at the time it was contracted with as such. *Shappel v. Hubbard*, at this term.

And it has been held in other states that where individuals are incorporated upon performance of certain acts, a person who contracts with them by their corporate name, cannot, in an action against him on the contract, deny the performance by them of the acts necessary to give them a corporate existence. *Hamtrank v. The Bank of Edwardsville*, 2 Miss. R. 169. — *Tarr River Navigation Co. v. Neal*, 3 Hawks, 520. See 1 U. S. Dig., 593; 4 *id.* 433.

In *New York*, to work such estoppel, it has been necessary that the contract should state that the party contracted with was a corporation. But this rule does not prevail in other states. It has not been acted upon in this state.

If the style by which a party is contracted with is such as is usual in creating corporations, viz., naming an ideality, but disclosing that of

<sup>1</sup> Part of opinion omitted. — Ed.

What is sufficient allegation of corp exists in techl or vs Corp. See ea: collected  
Am. Ca. 1913 C. 325

~~Wm. McLaughlin~~ 36/542. (1869). B had aux<sup>rs</sup> vs Mc + lived on an inc pol. Mc  
clames this was exempt. Stat that exempted inc pol<sup>s</sup> written by inc corp<sup>s</sup> or 22<sup>d</sup>  
s. laws. Cal. Only that Co exempted was that it was designated in process as Pac  
Mutual Bldg Co. Cal. Held: the name is not it does not raise a presumption that it  
JONES v. CINCINNATI TYPE FOUNDRY CO. 203 is an incorp<sup>d</sup> Co<sup>y</sup> 55<sup>c</sup>

no individual, as is usual in the cases of simple partnerships, it has been treated as prima facie, at least, indicating a corporate existence. - Acc 46 SE 671 Co  
And such seems to have been the rule at common law. Grant on Corp., 62. Probably, a special answer, in such cases, in the nature of a plea in abatement, might, at the proper time, be made available. See Ang. and Ames on Corp., 506, 507, and the numerous cases in our own Reports.

And there is no hardship in this. The party executing the note owes the amount of it. The judgment upon it in the suit merges it, and the payment of the judgment satisfies it, and bars any other action against the maker for the money.

But, in this class of cases, it would seem, after all, that the Courts have proceeded upon a rule of evidence, rather than the strict doctrine of estoppel. They have treated the contract with a party by a name implying a corporation, really as evidence of the existence of a corporation, more than as an estoppel to disprove such fact. Grant, in his late learned work on Corporations, says: "Generally, the fact of an aggregate body being called by a name, is, prima facie, evidence that they are incorporated, 'for the name argues a corporation.' Norris v. Staps, Hobart, 11. But the Courts take judicial notice that 'A. B. and company' is not the name of a corporation. Rex v. Harrison, 8 T. R. 508."

But cf. 36/542. 550. Pac Life Ins Co of Calif.

The doctrine of conclusive estoppel seems more properly applied to cases involving the question of legality of organization, where the fact of an existing statute, authorizing, in the given case, such corporation, is known to the Court, either by judicial notice or actual evidence in the cause.

In such cases, where a party has contracted with a body as being organized as a corporation under the law, he will be estopped to dispute the legality of the organization. See the cases cited in the U. S. Dig., and Ang. and Ames, *ubi supra*.

This doctrine of estoppel, as applied to contracts with corporations, needs further examination; but it is not important in this case, and we shall not here pursue it. The decision of this case will rest upon another ground.

[The learned Judge then takes the position that the general denial in the answer admits the plaintiff's capacity to sue, and that the subsequent paragraph denying plaintiff's capacity is in the nature of a plea in abatement and is inconsistent with such general denial.] - because Subsepl. Code

Name as ev. in cor<sup>p</sup>. 32(1).

Judgment affirmed. in this provides the us to go in disability parties must proceed to the merits

yo. here a prop right wh associates are entitled to assert in some form to do any wrong be done by allowing them to assert it in his form. Jones on the money. Aft will merge & debt & payt satisfy wh as any other act is here for B. He didn't introduce any ev to rebut & presumpt: & this was a Corp. Comment to make - saves time & going into details. incorp<sup>d</sup>

203 Laws 440. 445 - States as fact negth. -- "And where a plea this y has been for years an actual open & notorious in use, such alleged by State of the facts of a corp one who is sued on a note held such corp will not be permitted to go the validity of the incorp as a defence to the act. -- This is not upon the

## STOUTIMORE v. CLARK ET ALs.

1879. 70 *Missouri*, 471.<sup>1</sup>

## APPEAL from Clay Circuit Court.

The action, *Stoutimore v. Clark*, was brought to establish a certain charge as a lien upon the land formerly the property of Joseph Y. Clark, now deceased; and to obtain a decree for the sale of the land to satisfy the charge. By order of court, the Missouri City Savings Bank, and John Chrisman, were made defendants in said suit. The Bank filed an answer alleging a lien under a judgment against Clark, rendered March 27, 1874. This judgment was founded on a note of said Clark payable to the order of the Missouri City Savings Bank, at the office of said Bank. Chrisman filed an answer alleging a lien on part of the land under a trust deed, executed by Clark Sept. 19, 1874, to secure a loan. Chrisman also filed a cross answer to the answer of the Missouri City Savings Bank, alleging that said Bank was not a corporation. Upon the trial, to prove the corporate organization and existence of the Bank, a certificate signed by the alleged president and secretary was offered in evidence. To the admission of this certificate Chrisman objected, on the ground that it did not comply with the statutory requirements.\* This objection was sustained, and the evidence was excluded. The Circuit Court ordered the sale of the land; and directed that the judgment of the Bank should be paid out of the proceeds before the claim of Chrisman. Chrisman appealed from an order denying his motion for a new trial.

*D. C. Allen*, and *Samuel Hardwicke*, for appellant.

The doctrine of estoppel does not apply. It takes two to make an estoppel. There must be a party estopped, and a party in whose favor the estoppel works. *Herman on Estoppel*, 40, 41. It is plain from the evidence that the Missouri City Savings Bank never had a corporate existence, nor a lawful organization on which corporate existence could be based. The Circuit Court in excluding the certificate dated April 24th, 1869, so held. Hence there was no person in whose favor an estoppel could work. *Douthitt v. Stinson*, 63 Mo. 279. The judgment against Clark being a nullity (because not rendered in favor of any legal entity), no question of estoppel arises under it. *Bigelow on Estoppel*, 21, 283; *Wizom v. Stephens*, 17 Mich. 518.

[Omitting remainder of argument.]

*Simrall & Sandusky*, for respondent.

By the execution of the note Clark admitted the corporate existence of the Missouri City Savings Bank, and he was estopped thereafter from denying its corporate existence. [Omitting citations.] It was unnecessary to allege that plaintiff was a corporation; and therefore

<sup>1</sup> Only so much of the report is given as relates to one point. — Ed.

Chrisman acknowledged by Chrisman & no eff. & says it was signed. That said it consisted of an inclosure in all courts

unnecessary to prove it. Clark was not only estopped by the execution of said note from denying the corporate existence of the bank, but he was also estopped by the judgment. If the defense, *nul tiel corporation*, was open to him at all, it should have been asserted before the rendition of said judgment.

[Omitting remainder of argument.]

NORTON, J. . . .

In support of these positions it is insisted by counsel that, inasmuch as, on the trial of the cause, the Missouri City Savings Bank failed to introduce evidence establishing the fact that it was a corporation, the said judgment rendered in its favor was a nullity and did not create a lien upon the real estate of Clark.

We think the view thus taken is unsound. The note upon which said judgment was rendered is as follows:

"\$4,000.

MISSOURI CITY, July 1st, 1870.

Four months after date we promise to pay to the order of the Missouri City Savings Bank, Four Thousand Dollars, negotiable and payable at the office of the Missouri City Savings Bank, Missouri City, Mo., without defalcation or discount, for value received, with interest at ten per cent per annum from maturity until paid.

GILMER, CLARK & Co.

J. Y. CLARK.

R. G. GILMER, Security."

We think it clear that in the suit instituted by the bank on this note Clark would not have been allowed to deny the corporate existence of the bank for the reason that by executing the note he admitted the fact that it was a corporation, which estopped him from disputing it. This principle was distinctly enunciated in the case of *National Insurance Co. v. Bowman*, 60 Mo. 252, following the case of *Farmers and Merchants Insurance Co. v. Needles*, 52 Mo. 17, and the case of *O. & M. R.R. Co. v. McPherson*, 35 Mo. 13. In the case of *City of St. Louis v. Shields, et al.*, 62 Mo. 247, it was expressly held that the obligors on a bond given to a corporation by making and signing the instrument admit the corporate capacity of the obligee, and in a suit on such bond cannot plead *nul tiel corporation*. The cases cited indisputably establish that Clark, the obligor in the note upon which the judgment rests, could not have set up as a defense that the bank was not a corporation, and it therefore follows that the judgment, so far from being a nullity as counsel contend, was rightful and proper, and from the time of its rendition became a lien on the real estate of Clark in Clay county, and was conclusive and binding not only on him but upon all claiming through or under him.

[After discussing the doctrine of privity.] It thus appearing that Clark, against whom the judgment in favor of the bank was rendered, could not have prevented its rendition by disputing the corporate existence of the bank it therefore necessarily follows from the principles

It is undesirable to allow unauthorized acts by corps as such - informers prevog. state  
 Hence some check may reasonably be supposed. But where associates set up to  
 escape liability addrs as such as a corp. what good does it do. remainder - harm  
 and where it seeks to repudiate a debt his own ability. what good if cause them  
 some way anything for the.

SNYDER v. STUDEBAKER.

But if it is one who can be enforced as a corp. - immoral - illegal - then a fort n. as corp. 44 Mich 313  
 above announced that Chrisman, the beneficiary in the deed of trust  
 executed subsequently to the rendition of the judgment, and convey-  
 ing to the trustee for him land upon which said judgment had become  
 a lien, occupied no better position than Clark. The judgment being  
 efficacious to create a lien on Clark's land, could not have been drawn  
 in question by Clark on the ground that it was a nullity, because the  
 bank was not a corporation; nor can it be assailed on the ground by  
 Chrisman, who became a privy in estate by reason of the grant made  
 by Clark to him in the deed of trust of part of the land upon which  
 the judgment was attached as a lien.

Judgment affirmed.

when is the C more than unauthorized? <sup>is there any case</sup> <sup>is it prohibited?</sup>  
<sup>is to any associates</sup>

SNYDER v. STUDEBAKER.

1862. 19 Indiana, 462.

APPEAL from the Wells Circuit Court.

WORDEN, J. This was an action by Snyder against Studebaker,  
 to recover possession of a certain tract of land. Judgment for the  
 defendant.

The same question is presented by the pleadings and the evidence.

It appears that, in March, 1853, the plaintiff, who was then the  
 owner of the land, conveyed the same to the Fort Wayne and Southern  
 Railroad Company, by deed, duly executed and delivered.

This conveyance was made on account of a stock subscription.

Afterward, in November, 1855, the railroad company, for a valuable  
 consideration, conveyed the premises to the defendant.

The Fort Wayne and Southern Railroad Company was chartered  
 by an act of the legislature, passed in 1849; and it appears that the  
 corporators named in the act in question met in the town of Bluffton,  
 in said county of Wells, on the 19th day of November, 1851, and then  
 and there accepted the act of incorporation, and organized the company  
 pursuant to the provisions of said act.

If the corporation was not created before the 1st of November, 1851,  
 when the new constitution took effect, it could have no existence at  
 all, as that instrument prohibits the creation of corporations, other  
 than banking, by special act. *The State v. Dawson*, 16 Ind. 40;  
*Harriman v. Southam*, Id. 190.

The plaintiff claims, that inasmuch as there was no acceptance of  
 the charter, or organization under it, until after the adoption of the  
 constitution of 1851, there was no such corporation as *The Fort Wayne*  
*and Southern Railroad Company* at the time he executed the convey-

if who had  
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ance, and, hence, that no title passed from him. But is he in a condition to dispute the existence of the corporation at the time he made his conveyance to it?

It has been held, in numerous cases in this State, that a party who has contracted with a corporation, as such, is, as a general proposition, estopped by his contract to dispute the existence of the corporation at the time of the contract. The following cases may be cited, though there are, perhaps, others reported, and some not reported as yet. *Judah v. The American Live Stock Insurance Company*, 4 Ind. 333. *The Brookville and Greensburg Turnpike Company v. McCarty*, 8 Id. 392. *Ensey v. The Cleveland and St. Louis Railroad Company*, 10 Id. 178. *Fort Wayne and Bluffton Turnpike Company v. Deam*, Id. 563. *Jones v. The Cincinnati Type Foundry Company*, 14 Id. 89. *Hubbard v. Chappell*, Id. 601. *The Evansville, etc. Railroad Company v. The City of Evansville*, 15 Id. 395. *Meikel v. The German Savings Fund Society*, 16 Id. 181. *Heaston v. The Cincinnati and Fort Wayne Railroad Company*, Id. 275.

The doctrine is by no means confined to the State, but prevails elsewhere. *The Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238. *All Saints Church v. Lovett*, 1 Hall, 191. *Palmer v. Lawrence*, 3 Sand. Sup. C. R. 161. *Eaton v. Aspinwall*, 6 Duer, 176. *Jones v. Bank of Tennessee*, 8 B. Mon. 122. *Worcester Medical Institution v. Harding*, 11 Cush. 285. *The Congregational Society v. Perry*, 6 N. H. 164. *People's Savings Bank, etc. v. Collins*, 27 Conn. 142. *West Winsted Savings Bank v. Ford*, Id. 282. *Angell and Ames on Corp.*, sec. 94.

The estoppel arises upon matter of fact only, and not upon matter of law. Hence, if there be no law which authorized the supposed corporation, or if the statute authorizing it be unconstitutional and void, the contract does not estop the party making it, to dispute the existence of the corporation. But if, on the other hand, there be a law which authorized the corporation, then, whether the incorporators have complied with it, so as to become duly incorporated, is a question of fact, and the party making the contract is estopped to dispute the organization or the legal existence of the corporation. This proposition is substantially stated in the cases of *Jones v. The Cincinnati Type Foundry Company*; *Meikel v. The German Savings Fund Society*; and *Heaston v. The Cincinnati and Fort Wayne Railroad Company*, *supra*.

Let us apply the doctrine to the case before us. The incorporators named in the act to establish the *Fort Wayne and Southern Railroad Company* had a right, at any time before the offer of the franchises was withdrawn, that is, before the constitution of 1851 was adopted, to accept the charter, and organize under it. If they did so accept the charter, and organize, the corporation was legitimately created, and the new constitution did not destroy it.

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cf 100 Ind 111-3  
 estop. on fact law.  
 cf 16 Cy C 763 n. 50  
 Taylor Land 1  
 2 Ten. 5629



Whether they did so accept the charter, and organize, was a question of fact, and the plaintiff, by his conveyance, is estopped to deny such acceptance and organization.

That the corporators accepted the charter, and organized under it, within the time when it was competent to do so, was as fully admitted by the contract, as was any other step necessary to an organization.

The conclusion necessarily follows, that the plaintiff is estopped to dispute the existence of the corporation at the time of his conveyance to it.

This point was ruled the other way in the case of *Harriman v. Southam*, 16 Ind. 190, but, upon more more mature reflection, we are satisfied that the decision upon this point was wrong, and should be overruled.

We may remark, also, that the doctrine of estoppel was erroneously applied in the case of *The Evansville, etc. Railroad Co. v. The City of Evansville*, 15 Ind. 895. There the point made was, that the law, under which the corporation was organized, was unconstitutional and void. A party, we have seen, does not, by his contract, estop himself to deny that there is any law, or any valid law, by which the corporation was authorized.

Some further observation, in respect to the case before us, will not be out of place. The doctrine of estoppel, as applied to the case, does not rest upon a mere technical rule of law. It has its foundation in the clearest equity, and the principles of natural justice. The doctrine of estoppel, *in pais*, is of comparatively recent growth, but is firmly and clearly established. "The recent decisions of the courts, both in this country and in England, appear to have given a much broader sweep to the doctrine of estoppel *in pais*, than that which formerly existed, and to have established that, in all cases where an act is done, or a statement made, by a party, the truth or efficacy of which it would be a fraud, on his part, to controvert or impair, there the character of an estoppel will be given to what would otherwise be mere matter of evidence, and it will, therefore, become binding upon a jury, even in the presence of proof of a contrary nature." 2 Smith, Lead. Ca. p. 531, 1 Am. Ed. See, also, upon this subject, *Kinney v. Farnsworth*, 17 Conn. 355. *Middleton Bank v. Jerome*, 18 Id., 443. *Laney v. Laney*, 4 Ind. 149. In *Doe ex dem. Richardson v. Baldwin*, 1 Zabriske, 397, it was said, that "The doctrine of estoppel rests upon the principle, that when one has done an act, or made a statement, which it would be a fraud, on his part, to controvert or impair, and such act or statement has so influenced any one that it has been acted upon, the party making it will be cut off from the power of retraction. It must appear, 1. That he has done some act, or made some admission inconsistent with his claim; 2. That the other party has acted upon such conduct or admission; 3. That such party will be injured by allowing the conduct or admission to be withdrawn." Here the plaintiff, by his

208 Ill. 100, at 113 - cont'd. below. "We are understood as holding appellee is not liable in any event for use & occupation of appellants' premises, for we are of opinion if it occupied them under an agreement to pay rent a liability was created which may be enforced in some appropriate proceeding but it cannot be enforced in this court."  
Jeff. 100, at 113, 115

WINGET v. QUINCY BUILDING, ETC., ASSOCIATION. 209

conveyance to the corporation, admitted that it had an existence, and could receive the title. Upon this act and admission of the plaintiff the defendant has acted, in purchasing the land of the company. If the plaintiff had not conveyed to the corporation, the defendant would not have purchased from it. The law will not now permit the plaintiff to withdraw the admission made by him in conveying to the corporation, and deprive the defendant of the land which he purchased on the faith of such admission.

In our opinion, the judgment below is right, and must be affirmed.

*Per Curiam.* — The judgment is affirmed, with costs.

John R. Coffroth, for the appellant.

420 Kans 397 + 2b 440

59 WINGET v. QUINCY BUILDING, ETC., ASS'N.

1889. 128 Illinois, 67.

A BILL in chancery, brought by complainants to enjoin the sale of certain premises under the powers of sale contained in two deeds of trust executed by the complainants to the Quincy Building and Homestead Association to secure the repayment of money loaned.

MR. JUSTICE BAILEY delivered the opinion of the court: —

One of the grounds upon which the complainants seek to be relieved from the legal consequences of Winget's membership in the Quincy Building and Homestead Association, and from the obligations created by the notes and deeds of trust executed by them to said association is, that the association has no valid legal existence. In support of this contention they insist that the act of 1872 under which said association was organized is unconstitutional and void, because the entire scope of the act, as is claimed, is not sufficiently expressed in the title. On this point it is sufficient to say that whatever may be the fact in relation to the valid legal existence of said association as a corporation, the complainants are not in a position in which they can be permitted to challenge its validity. A party who has contracted with a corporation *de facto* as such, cannot be permitted, after having received the benefits of his contract, to allege any defect in the organization of such corporation, as affecting its capacity to enforce such contract, but all such objections, if valid, are available only on behalf of the sovereign power of the State. 2 Morawetz on Corporations, sec. 750, and authorities cited in note. And this rule applies even where the corporation is organized under a law alleged to be unconstitutional. *Friedland v. Pennsylvania Central Ins. Co.*, 94 Pa. St. 504; *McCarthy v. Lavasche*, 89 Ill. 270; *Dows v. Naper*, 91 Id. 44; Morawetz on Corporations, secs. 759, 760.

Pf. who has given a p. sale to Corp seeks to set up non corp char. Based on unconst. stat. under which? - Court - legal n. defiance, const. of. 89 Ill 270 + Morawetz comment

transacted under them 181 Ill 100; 185 Ill 100

In 208 Ill 100 held that a corp. Co. incorporated for purpose of lease of lot for 99 yrs & build of a building for rent thereon was a validly incorporated corp. of which had made a lease with it ad collaterally on a valid charter. Held the corp. was a de facto corp. no valid law - Leg. has shown that it is a corp. as shown by the fact that it is a corp. except as in relation to some other legal object. No attempt to dispute legal existence on the law creating its form etc. This is based on principle of law which will not deny its aid to a corp. as a de facto corp. on law does not authorize or forbid such corp. It is analog to n. v. acts of a corp. which are not authorized by law.

## JONES v. ASPEN HARDWARE CO.

1895. 21 Colorado, 283.<sup>1</sup>

## ERROR to the District Court of Pitkin County.

The Aspen Hardware Company instituted this suit in the court below for the purpose of recovering a stock of goods seized by the United States marshal under a writ of attachment issued out of the circuit court of the United States at the suit of Joseph A. Thatcher, plaintiff, against one A. B. Eads. The only question in the case has reference to the corporate capacity of defendant in error, it not having filed, prior to the attachment levy, its certificate of incorporation with the secretary of state, as required by statute. Session Laws of 1887, p. 406. In the district court judgment was entered in favor of the company. The statute reads as follows:

"Every corporation . . . incorporated by or under any general or special law of this state, . . . shall pay to the secretary of state for the use of the state, a fee [proportioned to the amount of capital stock]. . . . The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association, or charter of said corporation, . . . in the office of the secretary of state; and no such corporation . . . shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid; and the secretary of state shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, . . . until said fee shall have been paid to him. . . ."

In 1889, Bowles, Eads, and Kettler formed an organization known as the Aspen Hardware Company. They intended that the company should be legally incorporated. To this end they caused to be executed articles of incorporation, on Nov. 16, 1889, in due form; and immediately filed the same with the clerk and recorder of Pitkin County. For some reason not explained by the evidence, the articles were not filed in the office of the secretary of state until after the levy of the writ of attachment hereinafter referred to, and not until the day upon which this suit in replevin was instituted, but whether before or after the commencement of this action does not clearly appear from the evidence.

After the articles were filed with the county clerk, the directors therein named, of whom Eads was one, held a meeting, elected officers, caused capital stock to be issued, &c. Eads, thereupon, for a valuable consideration, sold and transferred to the new organization the stock in trade of a hardware business; and Bowles from that time conducted the business for the Aspen Hardware Company, selling goods and purchasing new goods in the corporate name.

<sup>1</sup> Statement abridged. Part of opinion omitted. — Ed.

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The business was thus continued until July 31, 1890, when a suit was commenced by Thatcher against Eads, and the property in question levied upon as the property of the defendant in that suit; and this action of replevin was immediately instituted to recover possession of the property, or its value.

A. B. McKinley, Hugh Butler, and Wilson & Salmon, for plaintiff in error.

H. W. Clark, and W. W. Cooley, for defendant in error.

HAYT, C. J. . . . The controversy in this case is narrowed to the single question of the capacity of defendant in error to take title to the property in controversy as a corporation at the time of the attempted transfer by Eads, it not having at that time filed its articles of incorporation with the secretary of state, or paid the fee for such filing, as provided by the statute of 1887. Session Laws of 1887, p. 406.

The language of the act is plain and unambiguous. It reads, "no such corporation . . . shall have or exercise any corporate powers. . . ." The taking of title to property was certainly the exercise of a corporate power, and as such prohibited by the express terms of the statute. This is not controverted by counsel for appellee, but it is contended that Eads having assisted in the organization of the corporation, and having sold to it the hardware stock, is estopped from denying the corporate existence of the company, and that the attaching creditor took the property subject to the same estoppel.

The doctrine of estoppel cannot be successfully invoked, we think, unless the corporation has at least a *de facto* existence. The rule is stated as follows by Morawetz on Private Corporations, sec. 750, it having been first announced in the case of *Brouwer v. Appleby*, 1 Sandf. 158: "A defendant who has contracted with a corporation *de facto* is never permitted to allege any defect in its organization as affecting its capacity to contract or sue, but that all such objections, if valid, are only available on behalf of the sovereign power of the state."

It is also well settled that to constitute a *de facto* corporation there must be either a charter or a law authorizing the creation of such a corporation, with an attempt in good faith to comply with its terms, and also a user or attempt to exercise corporate powers under it. *Duggan v. The Colo. Mort. & Inv. Co.*, 11 Colo. 113; *Bates et al. v. Wilson et al.*, 14 Colo. 140.

A *de facto* corporation can never be recognized in violation of a positive law. This principle, which seems to be supported by all the authorities, is thus stated by Morawetz on Private Corporations, sec. 758: "If the formation of a corporate association is not only prohibited by this general rule of the common law, but is also in violation of some principle of morality or public policy, or a *positive statutory prohibition*, the parties forming such association will not be legally bound by their agreement of membership, and the courts will not recognize the association, either as among its members or against

whether or not it is a law authorizing their act & whether or not the associates have not as yet taken a law if they can still in fact act as a unit. The absence of law is no more than absence of strict compliance with it does not render corporate or assoc. act invalid.

But is it a law positively forbidding corp. acts of course or prohibiting that act unless certain prerequisites have been complied with can it then recognize & unauthoriz. corp. acts? See p. 212

What is a *de facto* existence?  
 An *existent* in fact?  
 i.e. as a group acting as a corp.  
 Apparently not if CCC estoppel.  
 cf 19 NY 482.  
 also p. 217.

third parties." To recognize the defendant as a *de facto* corporation, would, as we have seen, be in direct conflict with the express language of the act, which declares that without the payment of the fee the corporation shall have no corporate power.

One object of this statute is to restrict the organization of "wild-cat" corporations, it being supposed that the increased fee required by the act would, in a measure at least, prevent the overcapitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate power, it is the duty of the courts to give effect to this intent as the same is manifest from the plain language of the act.

The taking of title to the property in controversy being the exercise of a corporate power, and, as such, forbidden until the fee for filing has been paid, it follows that the title of The Aspen Hardware Company as a corporation cannot be upheld. Having failed to comply with the statute, The Aspen Hardware Company at the time of the transfer was neither a *de jure* nor a *de facto* corporation, but simply a voluntary association of individuals in the nature of a copartnership.

112\* There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not made prerequisites to the exercise of such powers.

"In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter." *Abbott v. Omaha Smelting & Refining Company*, 4 Neb. 416. The omission in this case is of acts of the former class, and consequently there was no corporation *in esse* at the time of the levy of the writ, while the evidence leaves it in doubt if this omission had been supplied prior to the institution of the present action.

But although it could not at the time exercise any corporate power, this did not prevent The Aspen Hardware Company from taking title to the property as a copartnership. In other words, under the conceded facts, the company was not at the time a corporation, but this will not preclude it from maintaining the action as a copartnership. The plaintiff sues as The Aspen Hardware Company, and the facts alleged show that such company was a copartnership and not a corporation. There is nothing in the name of the association to conflict with this, as at common law partners may carry on business under any name they choose. They are bound rather by their acts than by the style which they give to themselves. *Cook on Stock and Stockholders*, sec. 233; *Chaffee v. Ludeling*, 27 La. Ann. 607.

This principle has been applied in many cases where parties have set up the defense of individual nonliability by reason of having

directed an incorporation to be had, but where none in fact was consummated. *Cook on Stock and Stockholders*, secs. 233, 234; *Abbott v. Omaha Smelting & Refining Co.*, *supra*; *Empire Mills v. Alston Grocery Co.*, 15 S. W. Rep. 505 (Texas).

The law having cast this liability upon the members of the association, we think they must be given the advantages accorded a copartnership. So, in this case, while we feel compelled under the statute to deny plaintiff's right of recovery as a corporation, we think they may maintain the action as a copartnership. The cause will accordingly be reversed and remanded, with directions to the district court to allow the parties to amend their pleadings as they may be advised.

*Reversed.*

Cases on corp seeks to set up corp character to escape indiv<sup>l</sup> liab<sup>y</sup>  
WILLIAMS v. HEWITT. Corp. n. a corp de facto

1895. 47 La. Ann. 1076.

MILLER, J. The plaintiffs seek to hold defendants liable for an amount deposited in the Traders' Bank, under which name it is alleged the defendants conducted the banking business, and the bank itself is included as a defendant. The defendants excepted that suing the bank along with the other defendants was a misjoinder, and estopped the plaintiffs from denying the corporate capacity of the bank; that this estoppel was further supported by the fact plaintiff had recognized the corporate capacity of the bank by depositing the money and other dealings with it; and the estoppel is placed by the exceptions on the additional ground that in a previous litigation between Mrs. Williams, the plaintiff here, and Hewitt, one of the defendants, she had made averments inconsistent with her position in this case, that the defendants are liable as members of an unincorporated association. These defences of estoppel are again urged in the answer along with the general issue, and the defence that plaintiffs dealt with a corporation and cannot hold the shareholders liable. The lower court overruled the exceptions on the merits, gave judgment against defendants, and they appeal.

The law recognizes a firm name and the petition sues the Traders' Bank, alleging it to be an unincorporated association and the individual members of the association averred to be commercial partners. Money in bank and other personal property of the partnership is usually held in the name of the partnership, and the law authorizes suits against the partnership and the individual members. We think there was no misjoinder. Code of Practice, Art. 198; Story on Partnership, secs. 102, 142.

The defendants objected to the testimony offered by plaintiff tending to show that the articles of association relied on to sustain the defence of the corporate capacity of the bank were never published as required by law. The objection was, the petition alleged no defects in the

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- organization of the corporation. In our view, it was unnecessary to make such allegations or offer the testimony. It is, we think, clear that sued as commercial partners it was for defendants to maintain they had become a corporation, by complying with the requisites of the law. Hence, the ruling on the testimony is of no consequence.

The legislation authorizing the formation of banking associations requires the organization articles to be by notarial act, stating the number of shares into which the stock is divided; the names, residences, and number of shares held by the shareholders; the time, manner of payment of the shares, with other particulars; and the act must be registered in the office of the recorder of the parish; the domicile of the corporation, and the act must be published in that parish and in New Orleans, and in Baton Rouge. Revised Statutes, sec. 279.

It is conceded that the act claimed to invest the defendants with corporate capacity contained no statement of the number of shares held by defendants, and was never published in New Orleans or Baton Rouge. Mere informalities in the act may well be disregarded, but it will not be disputed it is to be presumed that the omission in the act here, and the failure to publish it as required, are material. In our view, the fact affords no defence, and unless there is some other ground, defendants must be held as commercial partners. Cook on Shareholders, secs. 230, 231, 232, 233, 234, *et seq.*; Revised Statutes, sec. 282; *Field v. Cooks*, 16 An. 153; *Workingmen's Accommodation Bank v. Converse*, 29 An. 370; *Vrendenburg v. Behan*, 33 An. 635; Story on Partnership, sec. 164; Angell and Ames on Corporations, secs. 41, 591.

It is claimed, in support of the estoppel pleaded, that the tendency of more recent authority is that those who constitute themselves and do business as a *de facto* corporation cannot be held as individuals. If this is to be accepted, there is but limited, if any, necessity for our law providing for organization of private corporations, compliance with which has been generally accepted as essential to enable individuals, without incurring personal responsibility, to do the banking business. It would be enough to assume the name, appoint officers, and receive deposits and pay checks. But if the argument is to be deemed to affirm that an attempted organization under the corporation law will relieve individuals from liability in conducting a *de facto* bank, the answer is, we think, that the organization proposed must conform to the substantial requisites of the law, or it will be abortive. Mr. Cook thus states the law: "The creditor may ignore the asserted corporation, and proceed against the supposed stockholders, if the prescribed method of incorporation has not been observed." He recognizes that mere informalities are inconsequential. He mentions want of publication as fatal, and we think no less can be said of the absence of any statement of the number of shares held by shareholders, the measure of whose responsibility, indicated by the number of shares they hold, is important to be known to all who risk their money on deposit in chartered

*not de facto.*

banks. Cook, *Ibid.*, and our decisions cited. Revised Statutes, sec. 282; Angell and Ames on Corporations, secs. 41, 591. The fact then that the defendants assumed to be and did business as a *de facto* bank, even if that assumption is deemed conveyed to plaintiffs by the name of the bank and issue of the certificates, is manifestly no protection to defendants against liability in their individual capacities.

We do not understand that the testimony as to the dealings of the plaintiffs with the bank attributes to them any knowledge at the time they made the deposit of the attempted organization. The estoppel seems to rest on the deposit and the certificate issued by the institution known as the Traders' Bank. It is possible to conceive of one depositing his money in a bank with full knowledge the institution had proposed organization as a corporation under the laws, had failed, and yet was doing business. If anybody had that knowledge, in all human probability no such deposit would ever be made, certainly not, unless the depositor was satisfied of the personal responsibility of the parties engaged in the business, and relied on it, and on it alone. We cannot, therefore, find the basis for any estoppel based on any knowledge on plaintiffs' part of the attempted organization or its failure; for if he had any such notice he must be deemed to have acted on the faith of that personal liability it is now claimed he is estopped from asserting. If there was any estoppel of this character, the plaintiffs would be in this predicament: it is conceded the bank never organized, and hence plaintiffs have none of the remedies given by our legislation to creditors of corporations. Revised Statutes, sec. 275, *et seq.*; Act No. 150 of 1888; No. 95 of 1882.<sup>2</sup> Nor have they any recourse on the individual members of the unincorporated association if their theory on estoppel prevails. The plaintiffs, when they made the deposit, acted on the ordinary faith of responsibility for that deposit. Their knowledge that the institution was not chartered came to them after the deposit. There is, in our view, no basis to infer any notice to plaintiffs of any kind on which an estoppel can be based, unless we are to hold that the externals usual to all private banks, of the name of a bank and presidents and cashiers, with the issue of certificates of deposit, estop plaintiffs from asserting the individual liability of those who receive deposits.

The courts have not frequently applied the estoppel against denying the existence of the corporation. It will be found that in such cases the estoppel has rested on conduct of the corporation which made it inequitable for it to avail of the estoppel, and it strikes us if there is any room in this case for any estoppel, it would be that arising from defendants taking plaintiff's money on deposit as bankers with no license to do that business. It would be, in our view, a palpable wrong to plaintiffs if they were precluded from enforcing against defendants the liability announced in express terms by our statute and with equal clearness by the commercial law that unincorporated bankers shall be liable to the full extent of their engagements. Revised Statutes, sec.

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282; Story on Partnership, sec. 164, 77; Angell and Ames on Corporations, sec. 41, 591. Estoppels in favor of corporations have been placed on dealings with them resulting in some benefit or advantage obtained from the corporation, and very naturally, it has been held that the party holding such advantage or benefit could not dispute the resulting liability by denying the existence of the corporation when sued by it on his obligation. It is in great part the long line of cases of estoppels against or for corporations or asserted corporations all resting on some basis of conduct or of benefit obtained, or other cause forbidding as inequitable the estoppel attempted to be invoked, from which the defendants claim to derive support for the estoppel of conduct they plead. These cases, cited in defendant's brief, have had our attention and are covered, we think, by the comment we make. Thus in *Douglas County v. Bolles*, 94 U. S. 104, it was held the corporate existence could not be denied by its debtors; the same principle is applied in another case cited by defendants of suits to enforce stock subscriptions. *Casey v. Galli*, 94 U. S. 680, and there are similar types. The case of *Wallace v. Loomis*, 97 U. S. 446, affirms that corporate capacity assumed to obtain a standing in court cannot be afterward denied. Another phase of estoppel having some affinity to defendant's case, is that of a creditor selling to a corporation in progress of formation when the goods were sold, and the organization completed after, of all of which the creditor was fully advised when he sold the goods: in the suit brought by him against the individuals of the corporation it was very properly held he was estopped by the explicit communication to him, arising from the transaction itself and the correspondence, that he was dealing with an inchoate corporation, and was to rely alone on its responsibility. *Whitney v. Wyman*, 101 U. S. 392. In these and similar cases in which any dispute of the corporate existence has been deemed precluded, we can find nothing to support defendant's contention. The plaintiffs have obtained no benefit or advantage from defendants, nor done any act or pursued any line of conduct by which defendants have been prejudiced, or at all inconsistent with plaintiffs' suit to obtain their money from those who took it on deposit. The plaintiffs put their money in defendants' bank under the usual obligation of those who received the money to return the deposit when called upon. We can find no estoppel arising out of this transaction to defeat the plaintiff.

We have given the case in all its aspects careful attention, and in our view there was no defence. If we have not noticed all phases of the able discussion of the defendants, it is because the views expressed dispose of the case.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed with costs.

## SNIDER'S SONS CO. v. TROY.

1890. 91 *Alabama*, 224.<sup>1</sup>

ACTION for goods sold by plaintiffs, in 1888, to, or on the order of, The Dispatch Publishing Co. The complaint alleged that said Company was at the time a partnership, and that defendant was one of the partners; that the Company claimed to be a corporation, but was never in fact incorporated. Plea, setting out certain steps taken, in 1885, by defendant and other persons to organize a corporation by the above name; also alleging that the debt now sued for was contracted by said Company as such corporation, and not otherwise; and that plaintiff dealt with it as a corporation, and not as a partnership or association of individuals. A demurrer to the plea was overruled.

*E. P. Morrisett*, for appellant.

*Tompkins & Troy*, contra.

*Demurrer  
admits de facto corp  
1885*

CLOPTON, J. A corporation *de facto* exists when, from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and with the powers assumed, and a user of the rights claimed to be conferred by the law, when there is an organization with color of law, and the exercise of corporate franchises and functions. *M. E. Church v. Pickett*, 19 N. Y. 482; *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. Rep. 362. \*

The enabling law under which a corporation for the purposes and objects of the Dispatch Publishing Company, and with the powers assumed, might have been lawfully created at that time, is contained in sections 1803-1812 of the Code of 1876, and the amendatory acts, which authorize and provide for the incorporation of two or more persons desirous of forming a private corporation for the purpose of carrying on any industrial or other lawful business not otherwise specially provided for by law. Acts 1882-83, p. 40. The plea avers that defendant and two other named persons filed, September 2, 1885, with the judge of probate of Montgomery county, a written declaration, signed by themselves, setting forth substantially the matters required by the statute, except the residences of the persons, that they organized by the election of three directors, and commenced and continued to do business in a corporate capacity, and were so doing business when the debt sued for was contracted. If the averments of the plea be true, the truth of which is admitted by the demurrer, the Dispatch Publishing Company was an association having capital stock divided into shares, organized by the election of officers, and transacting business, and exercising franchises, functions, and powers, after an at-

<sup>1</sup> Statement abridged. Arguments omitted. — Ed.

tempted incorporation, as if it were a corporation *de jure*, a colorable compliance with the requirements of an existing and enabling law, and user of the rights claimed to be conferred thereby, the essential elements of a corporation *de facto*. *Central, A. & M. Ass'n v. Alabama G. L. Ins. Co.*, 70 Ala. 120.

Appellant seeks by the action to hold defendant, who was a member, liable as a partner for paper and other supplies sold to the Dispatch Publishing Company. Whether the shareholders in a corporation *de facto* are individually liable for the corporate debts, in the absence of fraud or a statute, is a question as to which the authorities are in direct antagonism. In *Cook, Stocks*, § 283, the doctrine asserted is: "A corporate creditor, seeking to enforce the payment of his debt, may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question." The leading cases supporting this doctrine are *Bigelow v. Gregory*, 73 Ill. 197; *Abbott v. Smelting Co.*, 4 Neb. 416; *Garnett v. Richardson*, 35 Ark. 144; *Ferris v. Thaw*, 72 Mo. 446; *Ridenour v. Mayo*, 40 Ohio St. 9; *Coleman v. Coleman*, 78 Ind. 344. We have omitted reference to a few cases, sometimes cited, for the reason, that either the question of liability as partners was not before the court, as in *Blanchard v. Kaull*, 44 Cal. 440; or the debt was contracted before any steps were taken, other than the mere filing of a certificate, towards organization, as in *Bergen v. Fishing Co.*, (N. J.) 3 Atl. Rep. 404; or it was contracted after the expiration of the charter by its own limitation without reorganization, as in *Bank v. Landon*, 45 N. Y. 410. In the case last cited, the shareholders entered into a special agreement, which by its terms created a partnership as to third persons. In 2 Mor. Priv. Corp. § 748, the doctrine is stated as follows: "If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members cannot be charged as parties to the contract, either severally or jointly or as partners." The following cases maintain the doctrine that the members of a corporation *de facto* cannot be held liable as partners for the corporate debts. *Fay v. Noble*, 7 Cush. 188; *Bank v. Almy*, 117 Mass. 476; *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. Rep. 362; *Bank v. Padgett*, 69 Ga. 164; *Bank v. Stone*, 38 Mich. 779; *Humphreys v. Mooney*, 5 Colo. 282; *Bank v. Walker*, 66 N. Y. 424; *Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Whitney v. Wyman*, 101 U. S. 392.

219\* { The plea and demurrer do not raise the question of the liability of the supposed stockholders, as partners, where there has been no intention or attempt to incorporate, where they are acting as a body corporate without even color of legislative authority, by sheer usurpation. The plea avers that the debt sued for was contracted by the Dispatch Publishing Company, which is alleged to have been a *de facto* corporation, and that plaintiff sold the goods to, and contracted with, the com-

pany as a corporation, knowing that it was doing business as such. The question before us, and the only question we propose to decide, is whether, there being no fraud alleged, nor statute making the stockholders individually liable, a creditor, who has dealt with a *de facto* corporation as a corporation, who has entered into contractual relations with it in its corporate name and capacity, can disregard the existence of the corporation, and, electing to treat it as a partnership, enforce the collection of his debt from the stockholders individually? The conflicting authorities afford aid in the solution of this question, only so far as their opinions may be in accord with settled principles and sustained by reason. Though it is an undecided question in this state, principles have been well settled which materially bear upon the inquiry, and mark the way to a correct conclusion. 92

Corporations may exist either *de jure* or *de facto*. If of the latter class, they are under the protection of the same law, and governed by the same legal principles, as those of the former, so long as the state acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, and who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the state, from whom is derived the right to exist as a corporation, and whose authority is usurped. This principle was clearly and emphatically declared in *Lehman v. Warner*, 61 Ala. 455, in the following language: "The corporation must of necessity be presumed to be rightfully in possession of the franchise, and rightfully to exercise the power which the legislative grant confers. Individual right is not invaded, if the negative is true in fact, and there is usurpation. It is the state — the sovereign — whose rights are invaded and whose authority is usurped. The individual could not create the corporation, could not grant, define, limit its powers, and no grant of these by the sovereign can lessen his rights. There can consequently be no cause of complaint by the citizen, and no right to inquire whether corporate existence is rightful *de jure*, or merely colorable." *Taylor, Corp.* § 145; 4 Amer. & Eng. Enc. Law, 198. The creditor cannot proceed against the stockholders as partners, without proving non-compliance with prescribed conditions precedent, thus inquiring collaterally, not into the fact, but the legality, of its existence. ?

It is also an established rule of general application, that a party who contracts with a corporation, exercising corporate powers and performing corporate functions, existing as a *de facto* corporation, in its corporate name and capacity, will not be permitted in a suit on the contract to deny and disprove the rightfulness of its existence. 4 Amer. & Eng. Enc. Law, 198. In *Swartwout v. Railroad Co.*, 24 Mich. 390, COOLEY, J., declares the rule as follows: "Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence, when it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is 2.

what it professes to be, and the questions are only whether there has been exact regularity and strict compliance with the provisions of the law relating to corporations, it is plainly a dictate alike of justice and public policy, that, in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporations or otherwise, such questions should not be suffered to be raised."

The general rule is thus stated by BRICKELL, C. J.: "Whoever contracts with a corporation in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the existence of the corporation, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or of rights arising under it, is sought." *Cahall v. Association*, 61 Ala. 232; *Central A. & M. Ass'n v. Alabama G. L. Ins. Co.*, 70 Ala. 120; *Schloss v. Trade Co.*, 87 Ala. 411, 6 South. Rep. 360. *Case is equally binding on corp. donee corp.*

It is conceded that the rule has been invoked and applied most frequently in suits against the stockholders or corporation or persons who have contracted with it, where the stockholder, or corporation, or person, is seeking to avoid a liability by denying the legality of the corporate organization. But why should it not be applicable in other cases? Why should the stockholder be estopped in a suit by a creditor of an insolvent corporation to require payment of his unpaid subscription, and the creditor allowed to ignore the existence of the corporation, and proceed against the stockholder as a partner? Why should not the estoppel be mutual? Taylor, in his work on Corporations, § 148, having stated the general rule, that a corporation, when sued on its contract, and the person who contracted with it, when sued on his contract, is estopped to deny its legal incorporation, adds: "Furthermore, persons who have contracted with a corporation as such, and have acquired claims against it, are estopped from denying its corporate existence for the purpose of holding its shareholders liable as partners." And the same rule was applied in several of the cases cited above, in which a corporate creditor was seeking to hold the stockholder liable as a partner for a corporate debt. The abrogation of the foregoing well-established rule is the logical sequence of maintaining a suit by a creditor of a *de facto* corporation, charging the stockholders as partners.

Another consideration. Section 8, art. 14, of the constitution, declares: "In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her." Exemption from liability other than for unpaid stock is the declared policy of the state. It cannot be imposed by legislation or by the judgment of a court. In view of the constitutional provision it is manifest that the shareholders of the Dispatch Publishing Company intended, by the attempt to incorporate, to avoid individual liability for the debts contracted by the corporation. When a party deals and contracts with a corporation as corporators, exemption from individual liability enters as an element of the contract. It is true that the liability of persons associated in an

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enterprise or adventure is not determinable by the name they may assume, but by the legal consequences of their acts. A partnership may arise as to third persons by mere operation of law, and contrary to the intention of the parties, but, to have the effect, the elements essential to constitute a partnership as to third persons must exist. A corporation *de facto* has an independent *status*, recognized by the law as distinct from that of its members. A partnership is not the necessary legal consequence of an abortive attempt at incorporation. As said in *Fay v. Noble*, supra: "Surely, it cannot be, in the absence of all fraudulent intent, that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of copartners, a liability neither contemplated nor assented to by them. The statement of the proposition carries with it a sufficient refutation."

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Maintenance of such suit involves judicial nullification of franchises and powers enjoyed and exercised by a *de facto* corporation as a distinct entity recognized by the law, acquiesced in by the state; defeats the corporate character of the contract; changes the relation from that of stockholders to that of partners; substitutes other and new parties to the contract; effects the imposition of an enlarged liability, which they did not assume, but intended to avoid, so understood by the creditor when he contracted the debt with the corporation as such. The contract is valid and binding on the corporation, which the creditor trusted. No injustice is done him, for all his rights and remedies are preserved by the principle, that the corporation and the shareholder are estopped from denying its legal existence, as against him. It will not answer to say that he is not repudiating, but enforcing, the contract. He repudiates the party, the corporation, with which he made the contract, and seeks its enforcement against parties who never entered into contractual relation with him. The doctrine that a creditor who has dealt with a *de facto* corporation in its corporate capacity cannot charge the stockholders as partners with the corporate debt, there being no fraudulent intent alleged and proved, seems to us to be sustained by the weight of authority, maintained by stronger reasoning consistent with well-settled principles, and in harmony with the policy of the state. Affirmed.

note.

DAVIS v. STEVENS.

1900. 104 Federal Reporter, 235.

IN the U. S. District Court for the District of South Dakota.

On March 21, 1900, creditors of the Bank of Plankinton filed a petition, praying that the Bank of Plankinton be adjudged bankrupt, as a private banking institution, and a co-partnership consisting of the above-named defendants. In their answer defendants deny generally the allegations of the petition, and, further answering, allege that the Bank of Plankinton was during the times alleged in the petition, and now is, a corporation duly organized under the laws of the territory of Dakota and the state of South Dakota. It appears from the testimony and admission of the parties to this proceeding that on the 27th day of November, 1885, articles of incorporation, duly signed and acknowledged by Edwin S. Rowley, Fred L. Stevens, Charles A. Johnson, Joseph D. McCormick, and William M. Smith, were duly filed in the office of the secretary of the territory of Dakota, wherein it was stated that the business of the proposed corporation, which was to be called the Bank of Plankinton, should be a general banking, real estate, and loan business. Upon the filing of said articles there was issued by the secretary of the territory of Dakota a certificate of corporate existence to the parties above named, wherein it was certified that said parties, their associates and successors, had become a body politic and corporate under the corporate name of Bank of Plankinton. . . . It further appears that the Bank of Plankinton did business as a banking corporation from the time of its alleged incorporation until about Jan. 10, 1900, when it closed its doors and ceased to do business.

CARLAND, District Judge. [After stating the case.] It is claimed by the petitioners that, as there was no law of the territory of Dakota which authorized the incorporation of individuals to do a banking business, the defendants in this proceeding, who are alleged to have owned stock in this corporation, were simply partners, and as such were doing business as a private bank, and thus subject to be adjudicated a bankrupt as a private bank. It is contended by the defendants that whether or not the Bank of Plankinton was a corporation cannot be inquired into collaterally, and that the state of South Dakota is the only power which could, by proceedings in the nature of a *quo warranto*, inquire into the legal organization of this corporation. If the Bank of Plankinton was a *de facto* corporation, this position would be unassailable. But, in order that there may be a *de facto* corporation, it must have been possible for the territory of Dakota to have chartered a *de jure* corporation, and as there was no law of the territory of Dakota permitting the incorporation of banking corporations at the time the Bank of Plankinton received its certificate of corporate existence, it results that there cannot be a *de facto* corporation. The

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limitation of the doctrine that the validity of corporate existence cannot be litigated collaterally is that, where there is no law under which a corporation might exist, then the validity of corporate existence may be attacked collaterally. *Heaton v. Railroad Co.*, 16 Ind. 275; *Krutz v. Town Co.*, 20 Kan. 397; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; 1 Thomp. Corp. § 505. As is said in section 502, 1 Thomp. Corp. :

"We must not get too far away from the primal proposition that the legislature alone can create a corporation, and that a collection of individuals cannot make themselves a corporation by merely resolving to be such, or calling themselves such. The three tailors of Tooley street did not make themselves the people of England by passing a resolution in which they styled themselves such. There must be some basis for the operation of the rule, and accordingly we find a better statement of it in the proposition that where a corporation exists *de facto*, and in fact exercises corporate powers, the question whether it exercises such powers lawfully cannot be litigated in a collateral proceeding between private parties, or between a private party and the corporation. The question can only be litigated between the corporation and the state."

Defendants invoke section 2892 of the Compiled Laws of Dakota, which is in the following language :

"The due incorporation of any company claiming in good faith to be a corporation under this chapter and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party, but such inquiry may be had and action brought at the suit of the territory in the manner prescribed in the Code of Civil Procedure."

This section, as I understand it, simply declares the law in the same manner that the courts declare it. It presupposes that there is a *de facto* corporation, which cannot exist if there could have existed no *de jure* corporation. In the case of *Oroville & V. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354, it was held by the Supreme Court of California that a similar provision in the laws of that state did not go to the extent of precluding private persons from denying the existence *de jure* or *de facto* of the alleged corporation.

As the claims of the creditors who are petitioners in this action arise from simply depositing money with the Bank of Plankinton, there is no such relation between the bank and the creditors as would allow the principle of estoppel to be urged. I, therefore, am of the opinion that the parties interested in the Bank of Plankinton were co-partners.

[Petition dismissed for other reasons.]

Cf 49 Ill. R. 58. "The public policy justifies, probably demands the recognition of an irregularly organized corporation which would exist with the permission of the law, a state which does not justify the recognition of a corporation regularly or irregularly incorporated which exists in defiance of the positive statute of the very public policy which is invoked to support it. - McBarf, *homo* is justified [Moraw. on Corp. n. estoppel] - at all possibility of organization of such a corporation under a statute properly phrased enacted: the corporation did not exist in defiance of a statute or of public policy. State has clearly had intervened on a contract which is included with it."



## ✓ EATON v. WALKER.

1889. 76 Michigan, 579.

Long, J. Plaintiff, in the year 1883, was a dealer in grain and produce, residing at Mason, in this State. Defendants were the sole parties interested in a business of buying and selling grain and provisions for immediate and future delivery for themselves and other persons on commission at Detroit, and were members of the Board of Trade of Detroit.

This action is brought upon an account stated by defendants to plaintiff in the sum of \$3562.68. The account was erroneously made out in the name of the firm of Walker, Summer & Co., with whom plaintiff had formerly done business, and of whom Mr. Walker was at that time a member.

No question was made on the trial as to the amount due the plaintiff from Walker, Hopkins & Co., but the defence rested on the single ground that Walker, Hopkins & Co. were a corporation, and not liable as individuals.

The plaintiff denied that Walker, Hopkins & Co. were a corporation, on the ground that the law under which the alleged corporation was formed was unconstitutional. The court held that such law was contrary to that provision of the Constitution which provided that "no law shall embrace more than one object, which shall be expressed in its title."

Therefore there was no statute under which defendants could lawfully incorporate as a mercantile company, and their acts as such are wholly void.

Defendants' counsel, however, insist that Walker, Hopkins & Co. were a corporation *de facto*, if not *de jure*.

But there being no valid law of this State under which the defendants could legally be incorporated, could they, even colorably, become a corporation, or have any existence as a corporation *de facto*, or would the plaintiff be estopped from inquiry into their corporate existence under such circumstances?

Two things are necessary to be shown in order to establish a corporation *de facto*, viz.: —

1. The existence of a charter or some law under which a corporation, with the powers assumed, might lawfully be created.

2. A user by the party to the suit of the rights claimed to be conferred by such charter or law. *U. S. Bank v. Stearns*, 15 Wend. 314.

If the law exists, and the record exhibits a *bona fide* attempt to organize under it, very slight evidence of user beyond this is all that can be required. *M. E. Church v. Pickett*, 19 N. Y. 487.

In *Heaton v. Cincinnati, etc., R. R. Co.*, 16 Ind. 275, the court says: —

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"The estoppel goes to the mere *de facto* organization; not to the question of legal authority to make an organization. A *de facto* corporation, that by regularity of organization might be one *de jure*, can sue and be sued, and a person who contracts with such corporation while it is acting under its *de facto* organization — who contracts with it as an organized corporation — is estopped, in a suit on such contract, to deny its *de facto* organization at the date of the contract; but this does not extend to the question of legal power to organize. Hence, if an organization is completed where there is no law, or an unconstitutional law, authorizing an organization as a corporation, the doctrine of estoppel does not apply."

The same rule was laid down by implication by this court in *Swartwout v. Michigan Air Line R. R. Co.*, 24 Mich. 393, as follows: —

"Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be; and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation, — it is plainly a dictate, alike of justice and of public policy, that in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised."

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And again it was said: —

"But both in reason and on authority the ruling should be the same where an attempt has been made to organize a corporation under a general law permitting it. If due authority existed for the organization, and the question is one of regularity merely, 'the rule established by law, as well as reason, is that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization.'"

In the present case, however, there was no law authorizing the parties to file their articles of association, or to become incorporated; and there could, under such circumstances, be no corporation *de facto*. It cannot, therefore, in any proper legal sense, be said that the carrying on of the business in the corporate name is evidence of user which can be considered in aid of their legal corporate existence.

Counsel for the defendants contend that the case of *Merchants', etc., Bank v. Stone*, 38 Mich. 779, is decisive of this case. In that case the defendants claimed to be incorporated as the "Charles Stone Timber Company." It appeared that the plaintiff transacted a large amount of business with the defendants, upon the specific understanding that the concern was contracting as a corporation, and not otherwise; and this court said: —

"Now, the proof that, as a matter of fact, the company carried on business as a corporation in the name of 'The Charles Stone Timber Company' when the bank dealt with it, established, *prima facie*, that

it was a corporation pursuant to law; and certainly the evidence the bank adduced in regard to the operations of the company, the attitude it maintained, and the character in which the two concerns dealt together, showed that the company was a corporation *de facto*, and so acknowledged by the bank."

In the present case the plaintiff offered evidence to show that he never knew, or had any information, that the defendants claimed that Walker, Hopkins & Co. were a corporation, but, on the contrary, that Mr. Walker, of that firm, asked him to continue his business with the firm as he had carried it on formerly with Walker, Summer & Co., and that the firm was composed of himself, William Livingstone, Jr., and Mark Hopkins, Jr.; and that he always believed and understood that Walker, Hopkins & Co. were a firm. This testimony the court below excluded. In addition to this, and upon this point, this case differs radically from the case of *Merchants', etc., Bank v. Stone*. The whole facts show that the firm never had any corporate existence, and never was a corporation, even *de facto*. It is very evident to us that the facts here presented do not bring this case within the ruling of the former case.

In the present case, as in that, the name would not indicate that the firm was a corporation. It gave no clue to the nature of the company as being incorporated or unincorporated, and there is no pretence of proof that the plaintiff dealt with it as a corporation, except the fact that defendants were doing business as a corporation, and had published such fact in two of the Detroit papers, and mailed circulars to their customers announcing that they had organized as a corporation under the laws of the State of Michigan, and also that their letter-heads showed this fact; some of the circulars being mailed to the plaintiff, and the corporation having also sent by mail statements of its accounts to plaintiff written upon such letter-heads.

The plaintiff testified that he had no recollection of receiving such circulars, or of ever having seen such announcements in the public press. Plaintiff also testified that he had no recollection of ever having received any letter-heads containing the information that defendants were a corporation; and it appears that when the account was made up by defendants showing their indebtedness to plaintiff, and transmitted to him, it was upon the letter-head of Walker, Summer & Co., which did not contain any showing that Walker, Hopkins & Co. were a corporation.

Plaintiff's counsel also offered to show by the testimony of the plaintiff that Mr. Walker solicited the plaintiff to do business with Walker, Hopkins & Co., stating to him that it was a partnership composed of Walker, Livingstone, and Mark Hopkins, Jr., and that in the faith of that statement the plaintiff commenced business with them. This testimony the court excluded.

Defendants' counsel, however, contend that inasmuch as the trial

court found as a fact that Walker, Hopkins & Co. were a corporation, and that, during the time it continued to do business, plaintiff had full knowledge that they were a corporation, and not a copartnership, and continued to do business with them as a corporation, such finding is conclusive, and will not be disturbed by this court.

It would be true that, if there was any proof to support the finding, this court would be bound by it, though, upon the facts, it might not be able to agree with the Circuit Court in its conclusions. But the fact is made to appear, by the evidence returned, that the court excluded the evidence of the plaintiff that he did not know that they were a corporation, and did not deal with them as such, but was informed by Walker that they were a partnership, and dealt with them in the belief that they were a partnership; and yet the court below finds, under the evidence which defendants were permitted to offer, that plaintiff did deal with them as a corporation, and had full knowledge that they were such, and bases such finding and conclusion upon the fact that defendants published the statements in the public press, and mailed circulars and letter-heads to plaintiff which it is not shown that he ever received. Under such circumstances, the court was in error in excluding the testimony, and we think there is no proof to sustain the finding.

It is undoubtedly well settled that a person who has entered into contract relations with a *de facto* corporation cannot, in an action thereon, deny its corporate character, or set up any informality in its organization, to defeat the action. The distinction between such cases and the present one is to my mind clear. De facto rule.

If there had been any law under which defendants had a right to incorporate, and the offer had been to show a mere abuse or excess of its corporate powers, or had it appeared that it was a *de facto* corporation, and the question related to the regularity of its organization merely, there could be no doubt that the plaintiff would be estopped from questioning its corporate existence.

But the two things necessary to show a corporation, even *de facto*, do not exist. There is no law under which the powers they assume might lawfully be created; and the mere fact that they assumed to act as such, even in the full belief that they were legally incorporated, would not constitute them a corporation *de facto*.

It is admitted upon this record that an indebtedness was due to the plaintiff in the sum of \$3562.68 at the date of the trial, July 19, 1888, and plaintiff seeks to hold defendants liable therefor as partners, and in this contention we think he is right. The defendants were not a corporation. They had associated together, each sharing the profits and losses of the business equally, according to the money each put in as capital stock, each holding and owning one-third part of the shares. The fact that they took counsel and acted in good faith in organizing under what they were advised was a valid law De facto as partners

does not relieve them of their liability. It is well settled that obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts. They have had the benefit of the plaintiff's means; they are indebted to him, as is conceded; but have sought to shift individual liability to a corporate one. There is no such corporation, and the mere fact that defendants assumed to act as such does not relieve them from personal liability.

Under the circumstances of this case, the defendants must be held liable as partners. The judgment of the court below must be set aside and vacated, and judgment entered here in favor of plaintiff in the sum of \$3562.68, with interest from July 27, 1883, being the date when the parties, claiming to be a corporation, made an assignment for the benefit of their creditors, together with costs of both this and the Circuit Court.

CHAMPLIN and CAMPBELL, JJ., concurred. SHERWOOD, C. J., and MORSE, J., did not sit.

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### ✓ MONTGOMERY v. FORBES.

1889. 148 *Massachusetts*, 249.

CONTRACT, to recover the price of goods sold and delivered.

At the trial in the Superior Court, before Dewey, J., the only question was whether the goods were sold to a corporation called the Forbes Woolen Mills, or to the defendant as doing business under that name. The plaintiffs introduced evidence tending to show that subsequently to May, 1885, they received an order for the goods by a letter, written upon paper with the printed heading, "Incorporated 1885. Forbes Woolen Mills. George E. Forbes, Treasurer," and signed, "Forbes Woolen Mills by Geo. E. Forbes, Treasurer"; that they thereupon shipped the goods to the Forbes Woolen Mills and received in payment therefor three promissory notes, together equal to the price of the goods, signed "Forbes Woolen Mills by Geo. E. Forbes, Treasurer"; that when they sold the goods and took the notes, they understood from their correspondence with the defendant, as well as from information gained from a commercial agency, that the Forbes Woolen Mills were a corporation, and made all charges on their books against them as a corporation, and took the notes from the defendant as the notes of a corporation; and that after they sold the goods and received the notes they became satisfied there was no such corporation as the Forbes Woolen Mills; and contended that they were entitled to recover the price of the goods from the defendant personally.

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*the case have not acted as a ruling ground. In this a charter by the state is held void with the  
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 193 Me 15, 42 of 143 Ky 537; 198 Mo 177, 35. 29 Conn 107, 45.  
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MONTGOMERY v. FORBES.

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The defendant contended that the Forbes Woolen Mills was a corporation, and testified that he purchased the goods as treasurer of the Forbes Woolen Mills, but admitted that they had not been paid for except by the notes, which themselves had not been paid; that in May, 1885, for the purpose of limiting his personal responsibility, and because the tax laws of New Hampshire were more favorable to corporations than the Massachusetts laws, he went to Nashua, New Hampshire, to form a corporation for the manufacture of woollen goods; that he employed an attorney at law of Nashua to incorporate the company in a legal and proper manner, under the laws of that State, and subsequently paid him for his services and disbursements in the premises; that he went to Nashua again, and with the attorney and three other persons, selected and secured by the attorney, signed and executed an agreement of association, which was dated May 6, 1885, and was duly recorded in the office of the Secretary of State of New Hampshire on May 12, 1885, and in the office of the clerk of the city of Nashua on May 13, 1885, and recited that the subscribers associated themselves for the purpose of forming a corporation, to be called the Forbes Woolen Mills, the amount of the capital stock to be twenty thousand dollars, divided into four hundred shares of fifty dollars each; and that the object of the corporation was to manufacture and sell woollen and other goods, and the places of business were Nashua in New Hampshire, and East Brookfield in Massachusetts.

The defendant further testified that, subsequently to the execution of the agreement of association, one or more meetings were held by the signers, at which he was elected president and treasurer of the corporation, and such other officers and directors were elected as were necessary under the laws of New Hampshire; that the attorney had been recommended to him as a reputable and reliable man and attorney, and he left everything in his hands, and supposed he did everything necessary and proper to establish the corporation in a legal manner; that records of the meetings were kept by the attorney, and that there was a stock-book and certificates of stock were issued; that all the stock was issued to the defendant, and that no other person was interested in it; that fifty per cent of the capital stock of the corporation was actually paid in by him in cash and supplies; that after the organization of the corporation he hired, as treasurer of the corporation, a mill in East Brookfield belonging to his mother, Roxanna Forbes, and himself, and began the manufacture of woollen goods; that he purchased the necessary supplies, including those named in the plaintiff's account, and placed them under the direction of a superintendent, employed to supervise the manufacture of the goods; that there was no manufacturing done in Nashua, nor any other business except the holding of corporate meetings, and possibly the sale now and then of a bill of goods in the ordinary course of business; and that the principal place of business of the corporation was in East Brookfield; that he, as president and treasurer of the corporation, continued to manu-

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 50 Ala 392; 55 Ala 392; 69 Ala 204 Pa 489; 121 Ala 340. 5. 107 Ky 154 69  
 29 Ala 116 440; 180 Mo 320. 30 1897 AC. 22. 43 (1887) 85 Tenn 672*

facture woollen goods for about four months, and sent the goods to commission houses in New York to be sold; and that at the end of said four months he was unable to continue the business and gave it up, and no further business was done by him or by the corporation.

The following sections of chapter 152 of the General Laws of New Hampshire of 1878, were introduced in evidence:

"Sect. 1. Any five or more persons of lawful age may, by written articles of agreement, associate together, for agricultural, educational, or charitable purposes, or for carrying on any lawful business, except banking and the construction and maintenance of a railroad; and when such articles have been executed and recorded in the office of the clerk of the town in which the principal business is to be carried on, and in that of the Secretary of State, they shall be a corporation, and such corporation, its officers and stockholders, shall have all the rights and powers, and be subject to all the duties and liabilities of similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter.

"Sect. 2. The object for which the corporation is established, the place in which its business is to be carried on, and the amount of capital stock to be paid in, shall be distinctly set forth in its articles of agreement."

Upon this evidence, the defendant asked the judge to rule that the plaintiffs were not entitled to recover, that the account in question had been paid by the notes of the Forbes Woollen Mills as a corporation, and that there was no evidence to authorize the jury to find for the plaintiffs.

The judge declined so to rule, and submitted the following questions to the jury: "1st. Did the Forbes Woollen Mills and the members of said alleged corporation, including said Forbes, at the time of its attempted organization, intend to carry on its business as a manufacturing corporation (other than holding meetings of its members and officers) in whole or in part in the city of Nashua, New Hampshire? 2d. Was there an attempt in good faith on the part of the defendant, Forbes, to organize the corporation of the Forbes Woollen Mills? 3d. Did said Forbes, at and prior to the time the goods in controversy were ordered, namely, at all times after May 12, 1885, during his dealings with the plaintiff, believe that the organization of said Forbes Woollen Mills was a valid corporation?"

The jury answered the first two questions in the negative, and the third in the affirmative.

The judge, being of the opinion that, upon the findings of the jury and the uncontradicted evidence in the case, the plaintiffs were entitled to recover, directed the jury to return a verdict for the plaintiffs, and reported the case for the determination of this court.

*W. B. Harding & H. F. Harris*, for the plaintiffs.

*B. W. Potter & M. M. Taylor*, for the defendant.

C. ALLEN, J. The apparent corporation was not a corporation. The statute of New Hampshire requires five associates, and the articles of agreement must be recorded in the town in which the principal business is to be carried on, and the place in which the business is to be carried on must be distinctly stated in the articles; otherwise there is no corporation. The defendant's pretended associates were associates only in name; he alone was interested in the enterprise. The articles of agreement were recorded in Nashua, and stated that the business was to be carried on there; but it was not in fact carried on there, and was not intended to be. The defendant took all the shares of the capital stock, and paid in to himself as treasurer only fifty per cent of the amount thereof. This is not a case where there has been a defective organization of a corporation which has a legal existence under a valid charter. Here there was no corporation. It was just the same as if the defendant had done nothing at all in the way of establishing a corporation, but had conducted his business under the name of the Forbes Woolen Mills, calling it a corporation. The business was his personal business, which he transacted under that name. *Fuller v. Hooper*, 3 Gray, 334, 341. *Bryant v. Eastman*, 7 Cush. 111.

The jury found that he did not in good faith attempt to organize the corporation, but that he believed it to be a valid corporation. His belief, in view of the facts of the case, is immaterial. Under this state of things, the defendant bought goods of the plaintiffs for his own sole benefit, adopting the name of the apparent corporation, which had no real existence, and which represented nobody but himself. He cannot escape responsibility for his purchases by the device of putting such a mere name between himself and the plaintiffs. The purchase was in substance by and for himself alone. The plaintiffs might have repudiated the transaction, and maintained replevin, if they had learned the facts in time. They may also treat the transaction as a sale to the defendant personally. *Fay v. Noble*, 7 Cush. 188, 194. *Kelner v. Baxter*, L. R. 2 C. P. 174, 183, 185. 2 Kent Com. (18th ed.) 630.

Since the notes represented nothing, the plaintiffs were at liberty to treat them as void, and recover on the original contract for goods sold. *Melledge v. Boston Iron Co.* 5 Cush. 158, 171.

#### Verdict to stand.

Regt. of. not always mentioned in setting forth the limits of def. doct. of 52 Minn 239  
 But in such cases no contention is made & assoc. have acted in bf.  
 It is usually stipulated for. Cf. 129 Cal. & also, *Duland Dist. v. Ship*, 185 U.S. 1, 16.  
 If the attempt at org. is in bf. but persons purchase alleged stock in bf. they  
 did n be held personally liable to those who have b-e-c Co. 80 Tex 344. Cf. 1 Pat. 46, 66  
 "It is extremely difficult to maintain upon genl principles of law that a private firm  
 the org. subscribers & commrs. be permitted to be set up to injuries of outright purch.  
 of stock who became bf. holders w/o any particip'n or n-e-c frd"  
 Hence Harrow phrases & rule thus: The persons seekg to prevent collateral attack  
 must have acted in bf.



## GOW v. COLLIN &amp; PARKER LUMBER CO.

1896. 109 Michigan, 45.

MOORE, J. The complainants James Gow and John Campbell, are copartners composing the firm of Gow & Campbell, engaged in a general lumber business at North Muskegon, where they own a mill. July 30, 1890, the defendants, William W. Collin, Charles H. Parker, and John A. Elwell, incorporated under the name of the Collin & Parker Lumber Company, for the purpose of "the purchase, manufacture, and sale of lumber, shingles, and other forest products, and carrying on a general lumbering business, and, incident thereto, to purchase and sell timber lands and timber," and to that end executed and filed articles of association for the incorporation of said company. The capital stock of the company was \$20,000, divided into 2000 shares, of which Collin held 1998, and Parker and Elwell held one share each. The articles of association, filed with the clerk of Muskegon County, state that the entire sum of the capital stock was paid in. August 30, 1890, the Collin & Parker Lumber Company increased its capital stock to \$30,000. January 24, 1891, the company filed its annual report in the office of the clerk of Muskegon County, in which it was stated that the capital stock was divided as follows: "William W. Collin, 2059 shares; Charles H. Parker, 60 shares; John A. Elwell, 1 share." The report also stated that —

"The amount of capital stock is \$30,000; the amount of capital actually paid in is \$21,200; the amount invested in real estate is none; the amount of personal estate is \$47,715.87; the amount of the debts of the corporation is \$45,927.65; the amount of the credits of the corporation is \$21,230.56."

January 30, 1892, the company filed its second annual report, in which it was stated the division of the capital stock had not changed from that of the previous year, and that its liabilities and assets were as follows: —

"The amount of capital stock is \$30,000; the amount of capital actually paid in is \$21,200; the amount invested in real estate is \$3000; the amount of personal estate is \$54,586.84; the amount of the debts of the corporation is \$53,630.32; the amount of the credits of the corporation is \$26,509.30."

The complainants allege that, relying on the statements in the articles of association and in the annual reports, and believing that the company had a capital stock of \$20,000, subscribed in good faith and paid in, and that the company was doing a legitimate and profitable business, and that the stock in trade and assets of the company were increasing, and never having any information to the contrary prior to December 20, 1892, they, in the year 1891 and the early part of 1892, sold to said company large quantities of lumber, for which

*Alleges fault of state in articles respecting capital, that the Co. on the strength of these statements*

the company paid in full; that complainant Gow, on or about May 10, 1891, and prior to the time when complainants made any sale of lumber to the company, made inquiries of Colon C. Billingham, cashier of the defendant the Lumberman's National Bank, as to the financial responsibility of said company, in order to ascertain whether it would be safe for complainants to sell to the company on credit, and were assured by Billingham that the company was all right, and that it would be safe for complainants to sell to the company on credit; that August 1, 1892, Collin, in behalf of the company, applied to complainants to purchase a million feet of lumber; that complainant Gow, knowing that defendants Hovey & McCracken had had and were having deals with said company, applied to McCracken for information as to the financial strength and credit of the company, and was assured by McCracken that the company was all right, that its financial responsibility and credit were good, and that Hovey & McCracken had sold to said company \$20,000 worth of lumber at a time, but that McCracken did not disclose to complainant that they had any security or guaranty for the payment of the same, and complainants were ignorant of that fact until December 20, 1892; that complainants, relying upon the financial strength and credit of said company as disclosed by its articles of association and annual reports, as well as upon the representations of McCracken, sold to the company, August 18, 1892, a million feet of lumber for \$7276.87, and delivered the same to the company from time to time, and took in payment therefor the notes of the company, described as follows: September 10, 1892, \$3000; September 26, 1892, \$2500; October 11, 1892, \$1776.87,—all payable to the order of complainants, 90 days after date, respectively.

December 20, 1892, the Collin & Parker Lumber Company executed and delivered to the Lumberman's National Bank a chattel mortgage for \$6000, covering all the personal property of the company, its accounts, bills receivable, and books of account, which mortgage was recorded the same day as a first mortgage. On the same day, defendant also executed and delivered a second mortgage on the above-described personal property, books of account, etc., to Hovey & McCracken, for \$14,425.39. Four other mortgages on the same property, except the accounts, bills receivable, books of account, etc., were also executed by the defendant in the following order, for the amounts specified: To complainants, Gow & Campbell, for \$7276.87; to Gray Bros. Manufacturing Co., for \$1302.26; to C. S. Bacon & Co., for \$3198.47; to James E. Austin & Co., for \$531. All of the mortgages were executed subject to the lien of the mortgage or mortgages that preceded them. December 28, 1892, Bacon & Co. and Austin & Co. assigned their mortgages to the complainants.

The bill of complaint alleges that Collin & Parker, at the time of the incorporation of the Collin & Parker Lumber Company, were pecuniarily irresponsible, and that Elwell was and is a man of large means and excellent credit; that he is the father-in-law of Collin;

that their incorporation was simply to procure a means of credit for Collin and Parker by lending the name and business standing of Elwell; that the statement made by them that the entire capital stock was paid in was false; that the company has never had any capital stock or stock in trade other than the lumber acquired after their incorporation from other firms and corporations, except some lumber purchased by Collin from Hovey & McCracken, for the payment of which Elwell had become personally responsible; that this lumber was turned over to the company by Collin; that the agreement between Elwell and Hovey & McCracken has been twice renewed and is still in force; that no payment has been made to Hovey & McCracken for lumber so purchased or thereafter purchased from them by said company or said Collin or said Elwell, except from the proceeds of the sale of the stock acquired by said company; that the annual reports were false and misleading, and were filed for the purpose of enabling the company to extend its credit; that all the statements made by the company relative to its business standing were intentionally and designedly for the purpose of misleading, deceiving, and taking a fraudulent advantage of those who should sell it lumber; that the defendants the Lumberman's National Bank and Hovey & McCracken were cognizant of the true condition and status of the company; that, by reason of the premises, the Collin & Parker Lumber Company never existed as a corporation, and is not now, and never was, a corporation, but now is, and since the date of its pretended incorporation has been, a copartnership; and that Collin, Parker, and Elwell are now, and since July 30, 1890, have been, copartners, and are jointly and severally liable as such.

The bill also alleges that on December 20, 1892, the bank and Hovey & McCracken took possession of the company's property by virtue of their mortgages, and proceeded to collect all outstanding accounts; that complainants were refused access to the books of the company, and claim there is yet sufficient assets to discharge the indebtedness due to them; that there is now due them on the mortgage executed to them by the company \$5500, with interest on \$3000, at the rate of 8 per cent from December 12, 1892; that there is now due complainants on the mortgage given by the Collin & Parker Lumber Company to Bacon & Co. \$1900, with interest as follows: On \$1500 from December 19, 1892, and on \$400 from December 25, 1892; that there is due complainants on the mortgage given by the company to Austin & Co. \$531; that the remaining sums secured by said mortgages will become due as therein respectively stated; that no payments have been made on any of said mortgages, nor has any proceeding at law been had for the recovery of the debts, or any part thereof, secured thereby.

The complainants ask that the pretended incorporation of the Collin & Parker Lumber Company be declared to be void, and that the stockholders be decreed to be partners, and liable for the debt of the com-

See Ketchell's  
association as  
partners.

plainants, and that the court determine how much is due complainants; that the Collin & Parker Lumber Company, William W. Collin, Charles H. Parker, and John A. Elwell, may be decreed to pay that amount, with costs; that the Lumberman's National Bank and Hovey & McCracken be required to disclose the true status of their business relationship with the company, and to disclose if the company has given them other security than the first and second mortgages mentioned before; for a writ of injunction restraining the bank and Hovey & McCracken from disposing of any of the property of the company, and that they apply what they have received from the assets of the lumber company on their mortgages; for the appointment of a receiver for the Collin & Parker Lumber Company, and the application on complainants' mortgages of the assets of the company; for a personal decree for any deficiency against Collin, Parker, and Elwell, and a prayer for general relief.

Defendant Elwell demurred to the bill, and the demurrer was sustained. Complainants failed to file an amended bill, and the court ordered the dismissal of the bill of complaint. The case is brought here for review.

if demure  
demure  
sustained

The complainants seek to have the corporation known as the Collin & Parker Lumber Company declared invalid and void, and its stockholders held to be partners, and liable for the indebtedness due the complainants. Are the complainants in a position to make that claim and to seek that relief? The company, in form, was duly incorporated, was recognized by the public authorities, and filed its annual reports, and did business as a corporation. The complainants dealt with it as a corporation, and accepted its mortgages, made as a corporation. In the case of *American Mirror & Glass-Beveling Co. v. Buckley*, 107 Mich. 447, it was held that, where an association was recognized by the public authorities as a duly organized corporation, and did business and filed its annual reports as such, a creditor who dealt with it as a corporation could not attack its corporate existence, and hold its stockholders liable as partners. See *Swartwout v. Railroad Co.*, 24 Mich. 389; *Merchants & Manufacturers' Bank v. Stone*, 38 Mich. 779, and cases there cited. The case at issue must be governed in that respect by the above-mentioned cases.

A leg<sup>r</sup> may require a certain mental state as a cond<sup>n</sup> precedent to incorp<sup>n</sup>. e.g. it may require that cert<sup>n</sup> subscription or pay be made in good faith. Sp leg<sup>r</sup> merely says cert<sup>n</sup> statements must be filed & recorded in a publ. office. Doesnt that mean made in b<sup>f</sup>. - Shdn. etc. so hold. Now sp leg<sup>r</sup> have req<sup>d</sup> assoc<sup>s</sup> to state & amb<sup>d</sup> CS subsc<sup>d</sup> up in, assoc<sup>s</sup> make statements wh are false. shdn't be false. If incorp<sup>n</sup> fails "such statements are made in b<sup>f</sup>. it seems to be clear & assoc<sup>s</sup> shd be held to full liab<sup>y</sup> on then C<sup>s</sup>. To say that A, other C<sup>s</sup> party is except when, incorp<sup>n</sup> has failed "assoc<sup>s</sup> made a rep<sup>t</sup> wh they knew untrue, & has acted on it to his own hurt is contrary to principles underlying a law scap<sup>d</sup>. Yi no eq in estopp<sup>r</sup> A. The eq is all other way there then is a ce in justice & public policy, both require & assoc<sup>s</sup> be held to full liab<sup>y</sup>. Cf 2 Mich 32.

## JOHNSON v. CORSER ET ALs.

1885. 34 *Minnesota*, 355.

On April 30, 1884, the defendants signed articles associating themselves together for the purpose of organizing as a body corporate under the name of "The Sixth Avenue North Extension and Improvement Association." These articles of association were not filed for record until November 21, 1884. In the first week in May, 1884, by-laws were adopted and officers were elected. On June 16, 1884, a contract in writing, in the name of the association, was made with Egan & Salter for grading and improving Sixth Avenue. Work was begun under this contract, and continued till August 5, 1884, when the plaintiff and others, laborers engaged upon the work, struck and refused to continue work, because they had not received their pay. Two of the defendants, the secretary and vice-president of the association, visited the scene of work and succeeded in inducing plaintiff and his fellow-laborers to return to work, upon the promise, as claimed by plaintiff but denied by defendants, that the association would pay them. Thereafter the plaintiff continued work till November 18, 1884, and the officers of the association paid them to October 1, 1884.

The plaintiff brought this action before a justice of the peace for Hennepin county against the defendants, as partners, to recover for his work and services from October 1, 1884, to November 18, 1884. Upon appeal to the district court, the action was tried before *Young, J.*, and a jury, and plaintiff had a verdict. Defendants appeal from an order refusing a new trial.

*Rea, Kitchel & Shaw*, and *Scott, Longbrake & Van Cleve*, for appellants.

*Thomas Canty* and *Robert Christensen*, for respondent.

DICKINSON, J.<sup>1</sup> In the spring of 1884 the defendants entered into articles of association, intending to acquire a corporate character, and probably supposed that this purpose had been accomplished. No incorporation was, however, effected. The articles of association executed by the defendants declared the purpose of the proposed corporation to be to secure the extension of a certain street in Minneapolis, and to improve and beautify the same. They provided for no capital stock, but that the funds necessary for the accomplishment of the contemplated purpose should be raised by subscription from the members. The usual officers were named, and a board of five directors provided for; meetings of the members were held; officers and a board of directors elected; by-laws adopted, which provided for the appointment of an executive committee, whose duty was declared to be to direct and superintend the work and to employ the necessary labor;

<sup>1</sup> Mitchell, J., did not hear the argument and took no part in this case.

subscriptions were made by all of the defendants, excepting Stark, for the purposes of the association; a contract was made between the association, by its adopted name, and certain contractors, (Egan & Salter,) for grading and improving the street, and the performance of the work under the contract was entered upon. The plaintiff was an employé of Egan & Salter, and engaged, with others, in the work. During the progress of the work, the employés of the contractors, becoming dissatisfied with their employers, ceased to work. Then two of the defendants, Mathews and Riebeth, who were respectively vice-president and secretary of the association, made an agreement with the laborers, the precise nature of which is in dispute. The evidence on the part of the plaintiff is sufficient to support what must have been the conclusion of the jury, that the agreement was that if the men would go on with the work, the association would pay them; while the evidence for the defendants tended to show that the agreement was merely to pay directly to the laborers the money which should be due to Egan and Salter on their contract. By this action the plaintiff seeks to recover against the defendants individually upon this agreement.

The attempt to become incorporated was ineffectual to limit the individual liability of the associates; and upon any contract which they may be found to have authorized to be made, or which they may have ratified, although in terms the contract was made as the contract of the association or assumed corporation, the members may be held to an individual responsibility. *Hess v. Werts*, 4 Serg. & R. 356; *Pettis v. Atkins*, 60 Ill. 454; *Bigelow v. Gregory*, 73 Ill. 197; *Garnett v. Richardson*, 35 Ark. 144; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Field v. Cooks*, 16 La. Ann. 153; *Jessup v. Carnegie*, 44 N. Y. Super. Ct. 260. While, if the other contracting party were to charge the defendants in their assumed corporate capacity, they might not in some cases be heard to deny their corporate existence, yet, there being in fact no such existence, the plaintiff may go behind the assumed corporate character, and hold the real principals to responsibility for the acts of those whom they may have clothed with authority to act in behalf of the association. *Bigelow v. Gregory*, *supra*; *Kaiser v. Lawrence Sav. Bank*, *supra*; *Jessup v. Carnegie*, *supra*; *Hurt v. Salisbury*, 55 Mo. 310.

We deem the evidence to have been sufficient to sustain a conclusion on the part of the jury that all of the defendants, the members of the association, authorized the prosecution of the contemplated work, and knew that it was actually being carried forward under the direction of the appointed agents of the association; that the executive committee was authorized by the association to prosecute the work as its agent, and for that purpose to employ laborers; that the alleged contract upon which this action is brought was made by two members of the committee in behalf of the association; and that the whole committee, having knowledge of that fact, ratified the agreement, making payments from time to time in accordance with it. Only as to two of

these particulars does the sufficiency of the evidence seem questionable, and only to that evidence shall we particularly refer.

It is in evidence that the defendant Stark did not subscribe or pay anything for the purpose of the association, and, after executing the articles of association, took no active part in the enterprise. He, however, subscribed to the articles of association, the declared purpose of which was the prosecution of this work. He was present on the occasion when the agreement sued on was made, and, as the evidence tends to show, heard the agreement then made, — that the association would pay the laborers, — although, according to his own testimony, the agreement was not such as is shown on the part of the plaintiff. We think this sufficient to warrant the conclusion that Stark was aware that the work was being carried on in behalf of the association with which he had united, and that Mathews and Riebeth in his presence assumed to make this contract as the contract of the association. If the fact were so, the mere silence of Stark might be deemed to signify his acquiescence.

It is not entirely clear from the evidence whether the agreement made by Mathews and Riebeth was communicated to all the other members of the executive committee. The by-laws adopted by the association declared that there should be an executive committee of five, of which the president, vice-president, and secretary should be *ex officio* members, and of which three members should constitute a quorum. But it is testified to that *five* members of the executive committee were elected. We are left in doubt whether the association in fact named three or five of its members, in addition to the *ex officio* members, as its executive committee. But this is not very material. It is distinctly testified to that the agreement made by two of the *ex officio* members of the committee was communicated to three of the other members of the committee, one of whom was the president, and that they assented to it. It further appears that other members named as members of that committee were present when computations were made of the amounts to be paid to the laborers; that meetings of the committee were held, at which they took action relative to the work being carried forward under the agreement made by Mathews and Riebeth; and that during a period of several weeks the laborers were paid by direction of the committee. While this evidence is not the most satisfactory, it is still such as to justify the conclusion that the agreement, as testified to on the part of the plaintiffs, was communicated to the executive committee as a whole, and was ratified and adopted by them. Nothing further was necessary to charge the defendants with liability.

The plaintiff asserts, as a rule of law applicable to the case, that, from the mere failure to perfect the contemplated incorporation, the association, after proceeding to carry on the proposed enterprise, became a partnership, and the members copartners, with authority (implied from their relations) in each member to bind all of the associ-

ates by any act within the scope of the business carried on by the association. We cannot sanction the application to this case of the doctrine of implied agency as it is recognized in ordinary business copartnerships. If it be conceded that the principle upon which the plaintiff relies exists and is applicable in cases where the business contemplated and carried on by the association, and the purposes for which it is prosecuted, are such as involve the essential elements of a partnership undertaking, or where the articles of association contain all that is essential to create a partnership, — still the principle is not applicable to this case, in which those conditions do not exist. So far as appears, the business undertaken and carried on by the defendants was not of a partnership character, nor the purposes such as to suggest the relation of copartners between those engaged in it. It was only the grading of a public street by the co-operation of these several persons, and that, so far as appears, for no purpose of gain or profit. This would not have constituted those uniting and contributing for such a purpose copartners; nor can such a result have been accomplished by the further fact that an incorporation was contemplated, and attempted to be perfected, but failed. We deem the liability of the defendants to rest upon the ordinary principles of contract and agency, and not upon the ground of an existing copartnership.

The articles of association executed by the defendants were properly received in evidence. This evidence went to show the co-operation of the defendants in the enterprise in carrying on which the contract sued on was made. The same is true of the proof of contributions of money from the defendants.

Order affirmed. *452 339.2443* Suppose body of men assumes to act as a corp on pt (no attempt to comply w/ forms of any law authorizing them to be such, & a def. corp might open door to public. It certainly be unlawful to permit a no. of men to have status as a corp to carry out merely *it is a law & rule they might become incorp. they have agreed among as to act & they have acted as a corp. The prov. conds in Johnson. Conds. They had no form far enough to become a def. corp. They had merely refused to be such but had no attempt to give them public status & they had merely*

(B) Where there have been no Dealings between the Parties on a Corporate Basis.

# 63 SOCIETY PERUN v. CLEVELAND.

*wh. Stat reg'd.*

1885. 43 Ohio State, 481.

ACTION by city of Cleveland to foreclose a mortgage, as against certain subsequent grantees, mortgagees, and purchasers. Perun, a corporation, Jan. 28, 1874, executed and delivered a mortgage to the city. This mortgage was not filed for record until Oct. 21, 1879. In February, 1874, certain persons attempted to organize, under general laws, a corporation by the name of Society Perun. In May, 1874, Perun delivered to Society Perun its deed, purporting to convey to the latter the premises theretofore mortgaged to the city. Between that date and Oct. 21, 1879, Society Perun, acting in its supposed corporate

*Perun mtd to city & later conveyed mtd premises to Soc Perun. an asso. who in turn conveyed to X.*

*City seeks to fc on its mtd as vs X et al*



On Maugham v. Clarke 17 C.B. 313, 443 chattels were sold to the City Investment Co. M. believed he was conveying to a corp. but there was no such corp. authorized. The title passed to the vendee. May 1868. The meaning of fraud is plain: deed purports to convey to those persons who use the style & firm name of the City I. Co. They may or may not be a corp; but when it is ascertained that they are on bus SOCIETY PERUN V. CLEVELAND. under that name & deed operates to convey & pass to them. Cf. 210 acc (M)

capacity, executed and delivered deeds and mortgages, purporting to convey and incumber parcels of these mortgaged premises to various parties, who are made defendants in the present suit. During the pendency of the present foreclosure suit, it was adjudged, in a *Quo Warranto* proceeding, instituted by the Attorney General, that the persons who attempted to incorporate under the name of Society Perun had not been legally incorporated, and that their attempted organization as a corporation was wholly void; and a decree of ouster was rendered. Upon the trial of the present foreclosure suit in the District Court, the plaintiff gave in evidence, against the objection of the defendants, the record of the *Quo Warranto* proceedings. Defendants offered evidence tending to prove an attempt in good faith to incorporate Society Perun. This evidence was excluded, and defendants excepted. The District Court found, among other things, that, as to the city of Cleveland, Society Perun was not a corporation either in law or in fact; that the conveyance to it by Perun was void as against the city; and that the claims of all the defendants (except certain claims for taxes and improvements) were subsequent and inferior to the lien of the city. To reverse the judgment rendered upon these findings, error was brought.

*Willson & Sykora*, for plaintiff in error.

*B. R. Beavis*, for executors of Stone, cross-petitioners in error.

*A. T. Brinsmade and W. E. Sherwood*, for city of Cleveland.

OWEN, J. The defendants below, conceding that Society Perun had never been a corporation *de jure*, maintain that the court below should have permitted them to prove that such society was a *de facto* corporation; that it attempted, in good faith, to become a body corporate; proceeded to act and transact business in good faith under the supposed authority of incorporation, and that its acts ought not to have been declared to be wholly void as against the city of Cleveland.

The judgment of ouster was an adjudication between the state and the society upon the right of the latter to exercise corporate franchises. For the purposes of such adjudication it was competent for this court to consider and determine what had been its *status* from its first attempt to incorporate. But it had no power to pass upon or determine the rights of parties not before it.

It was not competent for this court to determine in that proceeding that Society Perun had never been a corporation *de facto*, or that its acts and business transactions, under the color of its supposed charter powers, were void. The authority of the court in that behalf was derived from sec. 6774 (Rev. Stats.), which provides: "When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs."

When the court had excluded the society from its franchises to be a corporation, it exhausted its jurisdiction over the subject-matter. It had no power to speak concerning whatever rights may have been

acquired by the society as a corporation *de facto*, or by third parties in their transactions with it as an acting corporation.

It is conceded by the city that parties who had recognized the existence of the society by their transactions with it as a supposed corporation are estopped to deny its corporate existence. But it is maintained that the city, having engaged in no transactions with it, is free to challenge its existence as a corporation *de facto* as well as *de jure*. The argument is that: "No case can be found where it is held that there is a corporation *de facto* against persons who have in no way recognized its existence as a corporation," and that: "The notion of a *de facto* corporation is based on the doctrine of estoppel; when estoppel can not be invoked there can be no *de facto* corporation."

The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation.

"It is a self-evident proposition that a contract can not be made with a corporation unless the corporation be in existence at the time. A real contract with an imaginary corporation is as impossible, in the nature of things, as a real contract with an imaginary person. It is essential, therefore, in order to establish the existence of a contract with a corporation, to show that the corporation was in existence, at least *de facto*, at the time the contract was made." Morawetz Private Corporations, sec. 137.

It is bound by all such acts as it might rightfully perform as a corporation *de jure*. 'Where it has attempted in good faith to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation.

Proof was offered upon the trial below to show, (1) that the persons seeking to incorporate first filed with the secretary of state a certificate which fully complied with the requirements of the statutes, and free from the defect which finally proved fatal to its existence, but which was disapproved by the attorney-general; (2) That the certificate of incorporation which was finally filed with the secretary of state recited that, "said association has been formed and organized for the mutual protection and relief of its members, and for the payment of stipulated

sums of money to the families or heirs of the deceased members of said association; that the officers of said association have been duly chosen; that for the purpose of becoming a body corporate under an act passed by the general assembly of the state of Ohio, entitled, an act supplementary to an act, entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, 1852, passed April 20, 1872;” (3) That this certificate was approved by the secretary of state, and also by the attorney-general, as provided by the statutes (69 Ohio L. 150); (4) That it proceeded in good faith to transact business peculiar to corporations provided for by the act under which it attempted to incorporate.

All this was excluded, and the decision of the court below practically rested on the proof offered by the city, that Society Perun had been ousted of its franchises, which was evidently construed as determining that such society had from the first no corporate existence, either *de jure* or *de facto*, and consequently no capacity to receive or impart any interest in or title to real estate except as against such parties as were by reason of their recognition of or dealings with it, estopped to deny its incorporate existence.

Did the court err? This fairly presents the controlling and very important question: Was it competent to show, as against a party who was not estopped to deny its corporate existence, that Society Perun was, at the time of the transactions involved in controversy, a corporation *de facto*?

In *Attorney-General ex rel. Pettee v. Stevens*, Saxton (N. J. Eq.) 369, the relator sought to enjoin the Camden and Amboy R. R. and Transportation Co. and others acting under its authority from erecting a bridge over a navigable stream. The claim was that the act authorizing the corporation had been perverted and disregarded, and that there was no legal incorporation. The relators were in no manner estopped to attack the corporate existence of the respondent. The court held:

“Where a set of men claiming to be a legally incorporated company under an act of the legislature, have done everything necessary to constitute them a corporation, colorably at least, if not legally, and are exercising all the powers and functions of a corporation; they are a corporation, *de facto*, if not *de jure*; and this court will not interfere, in an incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers.”

The chancellor, speaking for the court, said:

“Here, then, is a set of men claiming to be a legally incorporated company under the act of the legislature, exercising all the powers and functions of a corporation. They are a corporation *de facto*, if not *de jure*. Every thing necessary to constitute them a corporation has been done, colorably at least, if not legally; and I do not feel at liberty, in this incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers. It has been seen

that the court will not do this where a corporation properly organized has plainly forfeited its privileges; and there is but little difference in principle between the two cases. In both the corporation is actually in existence, but whether legally and rightfully so is the question. And it appears to me that if the court can take cognizance of the matter in this case, it must in all others where it can be brought up, not only directly, but incidentally."

This case is approved and followed in *National Docks R. Co. v. Central R. R. Co.*, 82 N. J. Eq. 755, which held: "When a corporation exists *de facto*, the court of chancery can not, at the instance of private parties, restrain its operations upon the ground that its organization is not *de jure*. In such case the proper remedy is by *quo warranto*, or information in the nature thereof, instituted by the attorney-general." The rule of estoppel found no place in this case.

In *S. & L. G. R. Co. v. S. & C. R. R. Co.*, 45 Cal. 680, it was held that: "If a corporation *de facto* is in the actual possession of a public highway, under a grant of a franchise to improve and collect tolls on the same, a mere trespasser can not justify his entry thereon on the ground that it was only a corporation *de facto*, and was not *de jure* entitled to the franchise."

In *Williams v. Kokomo B. & L. Ass'n.*, 89 Ind. 389, one Leach gave to an acting corporation his mortgage on real estate. Subsequent to the execution and recording of it, he executed another mortgage on the same land to Williamson. In a proceeding to foreclose the junior mortgage, Williamson maintained that the pretended corporation had no legal existence, by reason of defects and omissions in the proceedings to incorporate, and that the senior mortgage was void. He was in no manner estopped, by dealings with, or recognition of, the first mortgagee to deny its corporate existence. The court held that: "A junior mortgagee can not defeat a senior mortgage by showing that the corporation to which the senior mortgage was executed was defectively organized, if it be a corporation *de facto*." Elliot, J., said: "Where persons assume to incorporate under the laws of the state, and in part comply with their requirements, assume corporate functions and transact business as a corporation, private persons can not collaterally question the right of such an association to a corporate existence, although there has not been a full compliance with the provisions of the statute. *Baker v. Neff*, 73 Ind. 68. *This rule is not limited to cases where one by contract admits corporate existence, but is a rule of general application.*" It is not easy to distinguish the principle of this case from that of the case at bar.

In *Pape v. Capitol Bank*, 20 Kan. 440, Pape and wife gave their notes to "James M. Spencer or bearer," and their mortgage on real estate to secure them. Spencer transferred the notes to the Capital Bank of Topeka, an acting corporation, with this indorsement: "Pay the bearer, without recourse on me; James M. Spencer." The mortgage was also transferred to the bank, which proceeded by suit to col-

lect the notes and foreclose the mortgage. Pape and wife interposed the defense that the bank was not, and never had been, a body corporate, by reason, among others, of a defective organization. The bank had assumed corporate functions after an attempt, in good faith, to incorporate, and for a number of years was in the actual and notorious exercise of corporate franchises. Pape had transacted banking business with the plaintiff prior to the purchase of the notes and mortgage, but such business was wholly unconnected with the notes and mortgage in suit. His wife, however, had not in any manner recognized the existence of the bank as a corporate body, and the doctrine of estoppel was not invoked to aid the court in sustaining a judgment of foreclosure against Pape and wife. Brewer, J., says: "The corporation is one *de facto*; and only the state can inquire, and that, in a direct proceeding, whether it be one *de jure*. . . . There must, in such cases, be a law under which the incorporation can be had; there must, also, be an attempt, in good faith, on the part of the incorporators, to incorporate under such law; and when, after this, there has been for a series of years an actual, open, and notorious exercise, unchallenged by the state, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defense to the action. No mere matters of technical omission in the incorporation, no acts of forfeiture from misuser after the incorporation, are subjects of inquiry in such an action. *This is not upon the ground of equitable estoppel but upon grounds of public policy.* If the state, which alone can grant the authority to incorporate, remains silent during the open and notorious assertion and exercise of corporate powers, an individual will not, unless there be some powerful equity on his side, be permitted to raise the inquiry."

In *Thompson v. Candor*, 60 Ill. 244, Willetts, in February, 1858, deeded to "Mercer Collegiate Institute," a body pretending to be a corporation, the tract of land in controversy. He died in March, 1858. In 1868 his heirs quit-claimed their interest in the land to Thompson, who filed a bill in chancery for the cancellation of the deed from Willetts to the "Institute," alleging, as one of the grounds of relief, that the named grantee was not legally incorporated — had no capacity to take the title, and that the deed was void. The court held:

"Where parties endeavor to organize a corporation for educational purposes, under the general law, adopt a name, elect trustees, and organize by electing a president and officers, and the trustees had acted for years in managing the property, had leased and mortgaged it, and expended a large sum of money in its improvement, these acts constitute it a corporate body *de facto*, and the regularity of its organization can not be questioned collaterally. Such irregularity can only be questioned by *quo warranto* or *scire facias*."

Thornton, J., says: "In 1856 an attempt was made to organize a corporation under the general incorporation law. A corporate name was selected, trustees were appointed, and an organization effected by

the election of a president and proper officers. The trustees thus appointed acted for years in the general management of the property, leased and mortgaged it, and expended a large amount of money. Here then was a corporate body *de facto*, which had been engaged in an undertaking involving important interests. The regularity of its organization can not be questioned collaterally. Any alleged non-compliance with the law can only be inquired into by the writ of *quo warranto* or *scire facias*."

There is no suggestion throughout the entire case of the rule of estoppel as an element affecting its disposition.

In *Paper Works v. Willett*, 1 Robertson (N. Y. Sup.), 131, it is held that formal defects in proceedings to organize a corporation are not available to defeat an action brought by a corporation for trespass in wrongfully taking property out of its possession.

See also, as illustrating the principle under discussion: *Smith v. Sheeley*, 12 Wall. 361; *Grand Gulf Bank v. Archer*, 8 S. & M. 151, 173; *Dunning v. R. R. Co.* 2 Carter (Ind.), 437; *Dannebroke Mining Co. v. Allment*, 26 Cal. 286; *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. 315; *Mitchell v. Deeds*, 49 Ill. 416; *Eliz. Academy v. Lindsey*, 6 Ired. 476; *Darst v. Gale*, 83 Ill. 136; *Rondell v. Fay*, 32 Cal. 354; *De Witt v. Hastings*, 40 N. Y. (Superior Court) 463; *Rice v. R. R. Co.*, 21 Ill. 93; *Douglas County v. Bolles*, 94 U. S. 104; *The Banks v. Poitiaux*, 3 Randolph (Va.), 136; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Baker v. Backus*, 32 Ill. 79; *Tarbell v. Page*, 24 Ill. 46; *Thornburgh v. R. R. Co.*, 14 Ind. 499; *Tar River Nav. Co. v. Neal*, 3 Hawks, 520; *Bear Camp River Co. v. Woodman*, 2 Me. 404.

In *Jones v. Dana*, 24 Barb. 395, it was held that if a company has in form a charter authorizing it to act as a body corporate, and is in fact in the exercise of corporate powers at the time of taking a note from an individual, it is, as to him *and all third persons*, a corporation *de facto*, and the validity of its corporate existence can only be tested by proceedings on behalf of the people.

In the case at bar, the certificate which was last filed by the society embraced a full statement of the objects of incorporation and indicated what the nature of its business must necessarily be, and was strongly suggestive of the manner in which it must necessarily be transacted; and while it is not our purpose to call in question the action of this court in the *quo warranto* proceedings, we have no hesitation in saying that if we were now called upon to determine whether the corporate life of Society Perun should be taken, the question, upon the facts offered in proof at the trial below, would not be free from doubt and difficulty. It is very clear that the proceedings to incorporate were colorable; and so far as this fact is a test of the existence of a corporation *de facto*, it is most amply established. That there was proof of user is manifest from the evidence which was received without objection.

That the judgment of ouster did not and could not have a retroactive

effect upon the rights of the society, and of parties who had dealt with it during its *de facto* existence, is suggested by the opinion of Wright, J., in *Gaff v. Fletcher*, 33 Ohio St. 115.

The evidence which was offered and excluded would, if credited, have shown Society Perun capable of holding and transferring the legal title to the lands in controversy. *Walsh v. Barton*, 24 Ohio St. 43; *Dart v. Gale*, 83 Ill. 186; *Shewalter v. Pirner*, 55 Mo. 218; *Nat. Bank v. Matthews*, 98 U. S. 628; *Goundie v. Northampton Water Co.*, 7 Penn. St. 238; *Barrow v. Nashville Turn. Co.*, 9 Humph. 804; *Kelly v. People's Trans. Co.*, 3 Ore. 189; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 758.

The public and all persons dealing with this society were justified in assuming that the certificate filed with the secretary of state, and by him admitted to record in his office, had been approved by him, and also by the attorney-general, as required by statute (69 Ohio L. 150), and that it so far conformed to all legal requirements that, as provided in section 2 of the act of incorporation (69 Ohio L. 83), "a copy, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such association."

It would seem that such approval, record, and certificate, followed by uninterrupted and unchallenged user for nearly six years, of all of which proof was tendered, would constitute a corporation *de facto*, if such a body is, under any circumstances, entitled to legal recognition.

The highest considerations of public policy and fair dealing protest against treating such an organization as a nullity, and all of its transactions void.

\* The principle of the above cases is to be distinguished from a case where a mere corporation *de facto* attempts to assert the power of eminent domain by the appropriation of private property to public use. It has been held that the exercise of this right (which is but a delegation of the sovereign power of the state), depends upon the sufficiency and legal validity of the certificate of incorporation and public record of its organization. *R. R. Co. v. Sullivan*, 5 Ohio St. 276; *Atkinson v. R. R. Co.*, 15 Ohio St. 21.

The case of *Raccoon River Nav. Co. v. Eagle*, 29 Ohio St. 238, is relied upon by the defendant in error. It was an action to recover upon a stock subscription. A plea of *null tiel corporation* was interposed. The plaintiff claimed to be organized under an act to authorize the incorporation of companies "for the purpose of improving any stream of water . . . declared navigable by any law of the state of Ohio." On the trial the plaintiff offered in evidence a certificate by which it appeared that the company was formed for the purpose of improving, etc., Big Raccoon river. Unfortunately there was no navigable stream in Ohio by that name. No other testimony was offered. There was no proof of user. There was no defect in the form of the proceedings to incorporate, but an attempt to organize and incorporate for a purpose impossible of accomplishment. There was

Limit of  
Corp. def.

Even if S.P. had n been incorp<sup>d</sup> associates / entitled in eq. to require a con-  
veyance - Perun. [29. deed to Grant Pass R.F. Geo<sup>n</sup> 15 Ore 476] cf 101/4 38  
In Eng legal title / Pass to Raso<sup>n</sup> (1905) 2 Ch. 349 cf 17 CB n. 2 443 chattels  
See pres<sup>d</sup> q<sup>u</sup>otes p 40, **BRADLEY v. REPELL.** 247

neither a *de jure* nor *de facto* corporation. Judgment was properly rendered for defendant.

In excluding proof of what was actually done looking to the incorporation of Society Perun, and of the subsequent acts of user, which was offered in evidence, there was error, for which the judgment in the first entitled case (as well as that in the same plaintiff against Hay et al., which was tried with it and involves the same general questions) are reversed. Numerous other questions are presented by the voluminous records in these cases, but as they all depend upon the one central and controlling question discussed above, and as the disposition here made of the cases must lead to a re-trial in the light of the principles indicated in this opinion, they are not separately considered.

*substantive Judgment reversed.*  
So the estoppel is ultimately by allowing associates to assert their right as a corp<sup>n</sup>.

69 BRADLEY ET ALS. v. REPELL.

1895. 133 Missouri, 545.

BRACE, P. J. This is an action in ejectment in common form to recover the possession of certain lands described in the petition, situate in Kansas City; instituted in the Circuit Court of Jackson County, taken thence by change of venue, and tried, in the Circuit Court of Clay County.

The answer was a general denial, and a plea of the statute of limitations as to a part of the land, and no claim as to the remainder. Issue was joined by reply.

On the trial, at the close of the plaintiff's evidence, the court sustained a demurrer to the evidence as to the plaintiff T. C. Bradley, and overruled it as to the other plaintiffs, Samuel F. Freeman and the Atlas Investment Company. The trial then proceeded, and after all the evidence was heard, the issue was submitted to the jury, who returned a verdict for the defendant. Thereupon plaintiffs filed motions for new trial and in arrest of judgment. The motion for new trial coming on to be heard, was sustained and the verdict set aside on the following grounds, "specified of record."

"9th. Because the Court erred in refusing to admit as evidence a certified copy of the Warranty Deed dated August 20, 1880, from the West Kansas City Land Company to Charles W. Whitehead, which certified copy was offered in evidence by plaintiff.

16th. Because the Court erred in refusing to admit as evidence the certified copy of the Quit Claim Deed from the West Kansas City Land Company to Charles W. Whitehead, which is offered in evidence by the plaintiff."

From the order sustaining this motion and setting aside the verdict, the defendant appeals.

(1). By a Special Act of the Legislature approved March 14, 1859

Judgment. Of  
claimant's claim  
of title in the  
appears a deed  
17. K. C. L. Co. - 1880  
of claimant's claim  
possession up to  
corp claimant's  
Co at the time  
deed



(Sess. Acts, 1858, p. 292), The West Kansas City Land Company was incorporated with power "to make contracts, sue and be sued," and to "purchase and hold any quantity of land in Kaw township in Jackson County, Missouri, not exceeding one thousand acres; to lay the same off into parks, squares, and lots, improve, sell or convey the same by deed; to re-purchase and re-convey any portion of the same, when necessary in transacting the legitimate business of said company; and purchase and hold any personal property necessary for the purposes above indicated." Nothing was said in the act either directly or indirectly as to the duration of the company's corporate existence. By the general law in force at the time this company was thus incorporated it was provided that "Every corporation, as such, has power, to have succession by its corporate name for the period limited in its charter and when no period is limited, for twenty years." R. S. 1855, Vol. 1, p. 369. Sec. 1. "And that upon the dissolution of any corporation, the president and directors or managers of the affairs of the corporation at the same time of the dissolution shall be trustees of such corporation with full power to settle its affairs." R. S. 1855, Vol. 1, p. 375, Cap. 34, Sec. 24. The corporation thus chartered was an ordinary business corporation whose corporate existence by virtue of these statutory provisions expired on the 14th of March, 1879, State ex rel. vs. Payne, 29 Mo. 468, and the two deeds rejected by the court upon the trial were executed after that date in the name and under the corporate seal of the company "by William McCoy, President." "Attest: Edw. A. Allen, Secretary." The defendant objected to the introduction of these deeds offered in evidence by the plaintiffs as constituting a part of their chain of title, and in support of his objections read in evidence the Act of the Legislature aforesaid incorporating said company, and it was admitted that said company in whose behalf said deeds had been so executed, was the same company by said act, incorporated, and that it was never thereafter re-incorporated. The defendant's claim of title was by adverse possession, and there is not in the case any question of estoppel to deny the existence of the corporation by reason of the relation sustained by the defendant to the land company, or of any dealings by him directly or indirectly with it, or any person connected with, or representing it. Why then should the defendant be precluded from showing, by the law that gave that company its corporate existence, that, at the time these deeds were made, it was dead, incapable of executing a legal conveyance of the real estate in question, and that said deeds were therefore void, and no evidence of title? The answer returned by the counsel for plaintiffs to this question is, "That it is the settled law of this State that a conveyance to, or by a corporation *de facto* can be assailed on the ground of lack of corporate existence *only by the State*."

This answer does not meet the question, unless it be assumed that a corporation whose corporate existence has expired by the terms of the law which created it, still exists as a *de facto* corporation as to all per-

of that no deed  
or relic

sons except the State, an assumption that we think is not sustained by the authorities cited, and is not "the settled law in this State." On the contrary, in this State, as elsewhere unless otherwise provided by statute, the law is, that where the term of the existence of a corporation is fixed by its charter or the general law, upon the expiration of that term, the corporation becomes *ipso facto* dissolved; it can no longer act in a corporate capacity, and its title to property ceases. 2 Beach on Private Cor. Sec. 780; 2 Morawetz, Sec. 1031. In such an event in this State the title to its property is by statute devolved upon trustees for the settlement of its affairs and the distribution of its assets. R. S. 1855 supra, R. S. 1889, Sec. 2513; and thereafter it has no power to make a legal contract or convey property in its corporate name and capacity. It ceases to be a corporation, *de jure et de facto*, for the reason that there is no law in force authorizing its existence, and no law by virtue of which it *might exist*, and no person unless estopped by his own action, ought to be, or can be precluded from showing this fact, apparent on the face of the law itself, without the necessity of any judicial investigation; in an issue involving his own personal rights and interests.

An examination of the authorities cited by counsel for respondents, and of all the other cases touching this question, will show that it has never been otherwise ruled in this State, nor elsewhere so far as we have been able to discover.

The first case cited by counsel for respondent McIndoe vs. St. Louis, 10 Mo. 576, does not touch the question, side, edge, or bottom

The cases of Chambers v. St. Louis, 29 Mo. 543; Land v. Coffman, 50 Mo. 243; Shewalter v. Pirner, 55 Mo. 218; and Conn. Mutual Life Ins. Co. vs. Smith, 117 Mo. 26; go no farther in the direction of our present inquiry than to hold that where *an existing corporation* has power to acquire, hold and dispose of land the question whether such corporation has transcended the limits of such power in respect thereto can only be raised and determined in a direct proceeding by the State against the corporation. But this falls far short of the question here; which goes to the fact of the *existence* of the corporation, conceded in these cases.

It is also well settled law that one who has contracted with an organization as a corporation, in its corporate name, is estopped from denying the existence of such corporation at the time of making the contract, or of alleging any defect in its organization affecting its capacity to contract or sue as a corporation upon such contract. 4 Thomp. Corp. 5275; 4 Am. & Eng. Encycl. of law, p. 198 and cases cited note 1, p. 199; 2 Morawetz Priv. Corp. Sec. 750, 753; Beach on Corp., Sec. 13. And so it has been ruled in this state in many cases, including those next cited in the brief of counsel for respondent. Ohio & M. R. R. Co. vs. McPherson, 35 Mo. 13; Farmers & Merchants Ins. Co. v. Needles, 52 Mo. 18; City of St. Louis v. Shield, 62 Mo. 247; Stoutimore vs. Clark, 70 Mo. 471; Studebaker Bros. v.

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Montgomery, 74 Mo. 101; St. Louis Gas Light Co. v. City of St. Louis, 84 Mo. 302, affirming 11 Mo. App. 55; Broadwell v. Merritt, 87 Mo. 95; Grandy Mining Co. vs. Richards, 95 Mo. 106. Of course such estoppel extends as well to the *privies* of; as to the parties to such contracts. Hasenritter v. Hirschhoffer, 79 Mo. 239; Ragan v. McElroy, 98 Mo. 349; Broadwell v. Merritt, 87 Mo. 95; Reinhard v. Va. Lead Mining Co. 107 Mo. 616. The rulings in none of these cases, however, support the contention that the deeds should have been admitted in evidence in the case in hand, in which, as has been already seen, there is no question of estoppel.

Nor do the cases of Finch v. Ullman, 105 Mo. 255, or Crenshaw v. Ullman, 113 Mo. 633, cited by plaintiff's counsel; in which it was ruled where there was a law authorizing the existence of a corporation, at the time when the organization assumed to act, and did act as such corporation, — that its corporate existence as to such act could not be called in question in a collateral proceeding; sustain respondent's contention. It is true in these and other cases, it is sometimes broadly stated as settled law, in substance, "that a transfer of property to or by a corporation *de facto* will be binding and valid as against all parties except the state," but this is simply a re-statement in another form of the proposition ruled. It implies that the case is one in which a corporation may by law exist, for there can be no corporation *de facto* when there cannot be a corporation *de jure*. 1 Beach on Priv. Corp. Sec. 13; 4 Thomp. Corp. Sec. 523-5275; at least as to any person who is not precluded by his own action, or that of those under whom he claims, from questioning its existence. Whatever may be the rule as to these, as to all other persons, there must be at least color of law for its corporate existence to preclude such inquiry, and it would seem to go without saying, that a law which gives existence to a corporation for a certain number of years at the end of which time it must surely die, cannot give color to its corporate existence after the date of its death as decreed by the terms of that same law.

Judge Thompson in his recent work on Private Corporations says: "There is much judicial authority for the proposition that where a corporation is brought to an end by the lapse of time, that is, by the expiration of the distinct limitation of its life in its charter, any further exercise of its corporate powers, may be questioned collaterally. The governing principle here is that upon the expiration of the time limited by the charter for the existence of the corporation its dissolution is complete. 'The dissolution in such case,' it has been said, 'is declared by the act of the Legislature itself.' The limited time of existence has expired, and no judicial determination of that fact is requisite. The corporation is *de facto* dead." Thomp. Corp. Sec. 530, citing in support of the text, People v. Manhattan Co., 9 Wend. N. Y. 351; Morgan v. Lawrenceburg Ins. Co., 3 Ind. 285; Wilson v. Tesson, 12 Ind. 285; Grand Rapids Bridge Co. v. Prague, 35 Mich. 400; Dobson v. Simonton, 86 N. C. 492; Sturges v. Vanderbilt, 73 N. Y. 384; Bank of U. S. v. McLaughlin, 2 Cranch C. C. (U. S.) 20. Further on in the same section, however, he

says: "On the other hand it has been ruled in Missouri, that the question whether the charter of a corporation has expired by limitation of time, can be adjudicated only in a direct proceeding by the State, that such a defense cannot be set up collaterally in an action by the corporation," — citing the single case of *St. Louis Gas Light Co. v. City of St. Louis*, 84 Mo. 202, affirming 11 Mo. App. 55.

In *Sturges v. Vanderbilt*, supra, decided in 1878, RAPALLO J. said: "It is further claimed that until a corporation is declared dissolved by Judicial decree, creditors may proceed against it by its corporate name, and that it remains *in esse* until formally adjudged dissolved. All the cases cited in support of this proposition relate to a dissolution in consequence of insolvency, or non user, or mis-user of the corporate franchises, or some other cause of forfeiture. In such cases it is well settled that the dissolution does not take effect until judicially declared. But the principle upon which that class of cases rests, is not applicable to a dissolution by expiration of the charter. The dissolution in such case is declared by the act of the Legislature itself. The limited time of existence has expired, and no judicial determination of that fact is requisite. The corporation is *de facto* dead. *People v. Walker*, 17 N. Y. 503; *Greely v. Smith*, 3 Story C. C. R. 658. Where the charter of a corporation is annulled by act of the legislature the corporation is extinct and no judgment can be rendered against it (*Mumma v. Potomac Co.*, 8 Pet. 286; *Merrill v. Suffolk Bank*, 31 Me. 57). We have been referred to no authority holding a contrary doctrine."

After a very extended search for, and a careful examination of, the cases, both before and since the date of this decision, we also have been unable to find any authority contrary of this doctrine; unless it can be found in the *Gas Light Co.* case above cited by Judge Thompson or in *Miller v. Coal Co.* 81 W. Va. 886 also cited by him, and to these cases our attention will now be directed.

In *St. Louis Gas Light Co. v. City of St. Louis*, which was an action by a corporation upon a written contract entered into between plaintiff and defendant, the defendant claimed that the plaintiff could not maintain its action thereon, because its corporate life had expired before the making of the contract and the institution of the suit. Upon this claim the court ruled, that, the defendant having by entering into the contract with the plaintiff admitted the capacity of the plaintiff to enter into a binding obligation as a corporation, the defendant was estopped to deny plaintiff's corporate existence, when sued upon a promise contained in such contract. After having by this ruling fully covered the point in issue, Judge Thompson, who delivered the opinion of the court, in the same connection, closed this paragraph of his opinion by adding the following dicta: "Whether or not its charter has expired by limitation is a question which cannot be adjudicated in a collateral proceeding such as this. *It can only be raised in a direct proceeding between the state of Missouri and the defendant.* *City of St. Louis vs. Shields*, 62 Mo. 247, 251." The case cited by the learned judge was one in which it was sought to draw in question the constitutionality of an act incorporating the plaintiff, in which the court held that the act was constitutional, and further that the defendant having

entered into the contract with the city admitted its corporate capacity and was estopped from denying it in an action upon such contract. While the latter ruling supports the ruling in the case in which it is cited by Judge Thompson, and is in harmony with all the cases, it does not support *his dicta* therein, that the question whether the charter of the corporation has expired by limitation "*can only be raised in a direct proceeding between the State of Missouri and the defendant.*" The dicta being, then, *obiter*, to the case then in hand, and unsupported by the case cited for it, is not to be regarded as authority. In the case of *Miller v. Coal Co.* 31 West. Va. 836, it was held, under the statute of that state, providing, in effect, that when a corporation shall expire or be dissolved, suits may be brought, continued or defended, property conveyed, and all lawful acts be done in the corporate name in the like manner and with like effect as before such dissolution or expiration so far as is necessary to wind up its affairs: That, a corporation continuing in business, and committing a tort after the expiration of the term of its existence, as provided by its charter, was precluded from setting up the expiration of its corporate existence as so provided in an action against it by the person injured by such tort. Here we have a law by which the corporation might exist for certain purposes after its charter term had expired, and a state of facts which precluded the corporation from denying its existence; in other words: *law for the existence of the corporation*, and an *estoppel to deny it*. These two elements are alike wanting in the proposition of the dicta of Judge Thompson, and in the facts of the case under consideration, and this West. Va. case, no more than the case of the *St. Louis Gas Light Co. v. St. Louis*, 11 Mo. 55 (*the ruling in which, but not the dicta, was approved in 84 Mo. 202*) is authority for his proposition or the respondent's contention in the case in hand.

We are cited by counsel for respondent to one other case, which has not yet been noticed, the case of the *Catholic Church v. Tobein*, 82 Mo. 418, in which it was held that the plaintiff suing as a corporation acquired no right to property devised to an unincorporated organization of the same name, by a will which took effect before the plaintiff was incorporated.

It cannot be seen how this case can in any way support the respondent's contention. On the contrary the ruling could have been made only upon an inquiry and finding that the alleged corporation was non-existent at the time the will took effect. It was non-existent then because there was no law authorizing its existence. If inquiry could be legitimately made in that case whether there was any law in force authorizing the existence of that corporation, why can not a like inquiry be made in the present case? The defendant was not precluded from making such inquiry by any act of his own, or of any other person under whom he claimed. He did not propose to bring in question the validity of any law, authorizing the existence of the corporation at the time these deeds were made, or the regularity or validity of the corporation organized under such a law, or the validity

of any of the acts of such corporation to determine which would require judicial investigation; but simply to show by the law which once had given corporate existence to the West Kansas City Land Company that, at the time these deeds purport to have been executed, that corporation had ceased to exist, and could not have executed them. Upon no principle of law with which we are familiar can he be precluded from so doing, and we think no well-considered case can be found, that properly understood, gives support to a ruling to that effect. We have been speaking of the law of the company's existence as a unit, for we fail to discover how the fact that the limit of the term of existence, being contained in the general law, and not in the special Act, can in any way affect the principle we have been discussing. The general law became a part of the charter of the company at the moment of its creation, and must be read into it, the same as if it had been written therein. It follows from what has been said that the trial court committed [no] error in rejecting the deeds aforesaid when offered in evidence by the plaintiffs, and that it did commit error in setting aside the verdict for defendant, and granting a new trial on the ground that it did commit error in refusing to admit said deeds in evidence.

We can review cases only upon the record made by the trial court, authenticated to us in the manner provided by law, and having thus reviewed this case and found that the trial court committed error in setting aside the verdict and granting a new trial for the reasons specified of record, and no other ground for such action appearing upon the record thereof before us, the same is reversed and set aside and the cause will be remanded to the circuit court with directions to enter up judgment in accordance with the verdict. All concur.

**PER CURIAM:** The foregoing opinion handed down in Division No. 1, is adopted as the opinion of the Court in Banc. GANTT, SHERWOOD, MACFARLANE, and BURGESS, JJ., concurring with BRACE, C. J., therein. BARCLAY and ROBINSON, JJ., dissenting. Judgment will therefore be entered as directed in the opinion.

## 70 BREWER v. THE STATE.

1831. 7 Lea (Tennessee), 682.

TURNER, J., delivered the opinion of the court.

Brewer was indicted and convicted in the Circuit Court of Hancock County, for selling intoxicating liquors within four miles of "McKinney High School," an incorporated institution of learning.

The proof shows the sale to have been in the town of Sneedville, within four hundred yards of the building in which the school was taught.

The act of 1875, ch. 142, entitled "An act to provide for the organization of corporations," makes provision for the organization of such corporations as the "McKinney High School." The charter of said institution was passed in the form required by law, and was acknowledged and registered and transmitted to the Secretary of State, but his certificate and the *fac simile* of the seal of the State had not been registered in the county at the time of the alleged offence.

By sec. 3 of the act it is provided: "The said instrument registered as aforesaid, shall be transmitted to the Secretary of State, who shall copy the same in a book to be kept for that purpose, with the probates, acknowledgments, certificates of clerk, register, etc. The Secretary of State shall then certify in the original instrument, that the same has been registered in his office, to which certificate shall be affixed the great seal of the State, and upon the affixing of the great seal of the State to said certificate or said original instrument, and the registration of said secretary's certificate and the *fac simile* of said seal in the register's office where said instrument was originally registered, the formation of the association as a body politic and corporate is hereby declared complete, and the validity of the same shall not be in any legal proceeding collaterally attacked."

As we have seen, these things were not done when the offence is alleged to have been committed; hence the "McKinney High School" was not then an incorporated institution in the sense of the statute, the defendant is therefore not guilty of the offence charged.

It is urged on the part of the State that sec. 20 of the act enacts "that the Secretary of State shall have published and bound with the acts of each general assembly a certified list of all corporations organized under this or any subsequent act of the legislature, since the last publication, giving the name and date of organization of each corporation, and such publication shall be legal evidence of the existence of such corporations." That this section having been complied with, the offence was complete.

The object of this section was convenience simply. The legal evidence created by it is only *prima facie*, and may be, as it was in this case, rebutted.

*Reversed.*

Unl. cases: Actn for tort to R.P. or O.P. 26 N.Y. 75, 178; 65 N.Y. 570 (Ev). 137 US 868. N.Y.  
[May] at 572. a def. corp may maintain an actn v. any one other than state who has  
C<sup>d</sup> corp or done it a wrong]. 68 F. 227;  
- Injunct: vs unrep. ing. to torts. 75 Ill 113; 130 Ind 71.

EAST NORWAY LAKE CHURCH v. FROISLIE.

255

4 Supton a note as bth. 166 Ill 213 cf 106 Mass 559

4 Use & occupat. land. 39 Ct Cl 225.

5 Suit to discharge incumbrance, grantor 67 N.Y. 190.

7 EAST NORWAY LAKE CHURCH v. FROISLIE.

act. def. corp may maintain eject vs one who has dealt c. assor<sup>d</sup> as corp.  
1887. 37 Minnesota, 447.

THE plaintiffs in this action are "The Trustees of the East Norway Lake Norwegian Evangelical Lutheran Church of Kandiyohi County, Minnesota," and "The Trustees of the West Norway Lake Norwegian Evangelical Lutheran Church of Kandiyohi County, Minnesota," and they brought the action in the District Court for Kandiyohi County, to recover the possession of certain real property detained by the defendant, and of which the plaintiffs allege that they are the joint owners. The answer denies plaintiffs' incorporation and ownership, admit defendants' possession, and justifies the same under a lease from the administrator of the estate of L. J. Markus, deceased, under the circumstances stated in the opinion. The action was tried before Brown, J., and a jury, and plaintiffs had a verdict. Judgment was entered thereon, from which the defendants appeal.

MITCHELL, J. . . Defendants, however, attack plaintiffs' title. They claim that they were never legally organized, and hence were incapable of taking or holding property. The points made in support of this contention are that the meetings at which the organizations were attempted to be made were not held after sufficient notice; that the certificates of incorporation were not properly executed, acknowledged, or recorded, etc.; and that Sp. Laws 1878, c. 193, purporting to legalize the organizations, is unconstitutional. Under the view we take of the case it is wholly unnecessary to consider any of these questions. The plaintiffs are at least corporations *de facto*. Such a corporation, at least where there is a law under which a corporation might have been legally formed with such power, is capable of taking and holding property as grantee as well as a corporation *de jure*, and conveyances to it are valid as to all the world, except the state in proceedings in *quo warranto*, or other direct proceedings to inquire into its right to exercise corporate franchises. And in an action by it to recover such property, no private person will be allowed to inquire collaterally into the regularity of its organization. This rule is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broader principles of common justice and public policy. It would be unjust and intolerable if, under such circumstances, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization. } Reason.

Judgment affirmed.

In eq atleast: associates w compel their grantor to convey and allow  
ei maintain ejectment in A's name [cf ? 61 Ala 232, 14 Colo 140, 60 Ill 246  
35 Ill App 248, 73 Ind 68, 89 Ind 389, 29 Kans 746, 107 Mo 616, 24 N.Y.  
48 Md 184, 168 Mass 92, 96, 12 N.H. 658]

Actn by a def. corp v. grantor for reformatio & deed. 95 91 N 327 (Neb)

Ejectment in name of grantor cf 114 Mass 140.5



*De jure corp'cs have compel'd payt 116 Mass 471*

INDIANAPOLIS FURNACE CO. v. HERKIMER. *cf 246*  
*sub'g'd of Corp on a subscrip*  
 1873. 46 Indiana, 142.<sup>1</sup>

FROM the Marion Circuit Court.

*Hendricks, Hord & Hendricks and Test, Burns & Wright*, for appellant.

*J. E. McDonald and J. M. Butler*, for appellee.

WORDEN, J. Complaint by the appellant against the appellee on the following paper subscribed by the defendant.

"Articles of association of the Indianapolis Furnace and Mining Company, organized for the purpose of operating in the counties of Marion and Clay, in the State of Indiana.

"Article First. The name of said company shall be the Indianapolis Furnace and Mining Company.

"Article Second. The capital stock of said company shall be one hundred thousand dollars, and be divided into shares of fifty dollars each, to be paid for in such amounts and at such times as may be ordered by the board of directors.

"Article Third. The stockholders shall elect directors, who shall from their number elect a president, secretary, and treasurer, who shall hold their office for one year and until their successors are elected and qualified.

"Article Fourth. The board of directors shall have the control and management of the business of the company, except as they may appoint some one or more persons to take charge of the same, in which case the record of the action of the board in appointing them shall be evidence of their authority to act for said company.

"Article Fifth. The board of directors shall have power to make assessments on stock, collect the same, issue certificates therefor, and declare and pay dividends, which shall be at least twice a year.

"Article Sixth. All the expense incurred by the company shall be paid, and all the indebtedness of the same shall likewise be discharged before any dividends shall be paid to the stockholders, unless the directors shall direct otherwise.

"Article Seventh. We, the undersigned, hereby subscribe to all the foregoing articles, provisions, conditions, and stipulations, and agree to the organization of a company as therein stated, binding ourselves to take and pay for the number of shares of stock set opposite our names respectively, and pay for the same at such times and in such

<sup>1</sup> Only part of the opinion is given. — ED.

amounts as the board of directors may order the same to be paid for, without relief from valuation or appraisement laws.

"Subscribers' Names.	No. of Shares.
"J. D. Herkimer, by D. Root,	100."

There were three paragraphs in the complaint, each counting upon the same instrument, in each of which it was alleged that at the time of the execution of the instrument by the defendant, the plaintiff was a duly organized corporation; but it is not alleged in either paragraph that after the execution of the instrument any steps were taken to perfect the organization.

The defendant demurred to each paragraph, assigning for cause the want of a statement of sufficient facts, but the demurrers were overruled, and the defendant excepted.

The defendant then answered,

1. By general denial.
2. *Nul tiel corporation.*
3. *Nul tiel corporation*, setting out specially the omission of the performance of the acts required by the statute, in order to perfect the corporate organization.
4. A denial of the execution of the instrument, sworn to.

Trial by the court, finding and judgment for the defendant, the plaintiff having unsuccessfully moved for a new trial.

We may properly here notice another proposition, which, though not perhaps directly involved, is in some measure connected with the motion for a new trial. We are of opinion that a radical error was committed in overruling the demurrers to the several paragraphs of the complaint. The articles of association signed by the defendant, including his subscription for stock, were very clearly mere preliminary articles, contemplating a future perfection of the organization as a corporation. The defendant's contract did not purport to be with an existing corporation, but with one to be brought into existence in the future. The averment in the complaint that the plaintiff was, at the time the subscription was made, an existing corporation, cannot change the nature and legal effect of the defendant's contract. That contract was, in legal effect, that the defendant would take and pay for the stock subscribed for, in case the organization should be perfected and the corporation brought into legal existence, and not otherwise. Such preliminary subscriptions seem to enure to the benefit of the corporation when formed. *Heaston v. The Cincinnati, etc., Railroad Co.*, *supra*.

But unless the subsequent steps, necessary to bring into existence the corporation, were taken, there was no corporation to whose benefit the contract could enure, and the defendant could not be liable; and it should have been averred in the complaint that such steps had been taken. *Wert v. The Crawfordsville and Alamo Turnpike Co.*, 19

*Nature of Contract*  
*subscription*

Ind. 242; *Williams v. The Franklin Township Academical Association*, 26 Ind. 310.

In such case, the estoppel growing out of a contract with a party as an existing corporation does not apply. In the case last cited, the court say:

"This rule of estoppel does not apply to a suit brought on a subscription made with a view to the organization of a corporation, and as preliminary thereto, where other acts are required by the law as a condition precedent to the exercise of corporate powers."

[The court then held, that, under the statute, it was an indispensable prerequisite to the legal existence of the corporation that a certificate should be filed in the office of the Secretary of State, which was not done in the present case.]

Now, although the complaint was held good, the pleas of *nul tiel corporation* put in issue the existence of the corporation; and we think, under the issues, the plaintiff was bound to prove such existence by showing a compliance with the statutory requisites. The burthen was on the plaintiff, because the defendant was not estopped by his contract to dispute the existence of the corporation, and because the perfection of the organization was a condition precedent to the plaintiff's right to recover.

We now proceed to consider the ground, upon which it is claimed that a new trial should have been granted. There were six reasons assigned for a new trial. [One reason was, the refusal of the court to hear the testimony of Horace W. Hibbard, to the effect that the defendant told him that he had five thousand dollars of the stock of said company, and offered to trade the same to him. As to this Worden, J., said]: The evidence of Hibbard was properly rejected, because such recognition by the defendant of the existence of the corporation could not estop him to controvert the fact; nor could it supply the omission of an act which the law requires to be performed before the corporation can be called into being.

*Judgment below affirmed.*

#### 1874. ON PETITION FOR A REHEARING.

WORDEN, C. J. The appellant has filed a petition for a rehearing in this case, claiming, as we understand the argument, that as it was shown by averment and proof, that the defendant's contract was made with an existing corporation, it should be treated as such; and therefore it was unnecessary for the plaintiff to show that the proper steps had been taken to perfect the organization of the corporation.

In the original opinion, we set out in full the contract entered into by the defendant. That contract very clearly was not with an existing corporation. It contemplated a future organization of the corporation, to which he was to become liable on his subscription. To treat him as having promised to pay the amount of his subscription to a corporation

*The party entering into a corp. is presumed to have a right under C.L. of contract to get back a corp. acting as if it. It ought not to ignore or suppress that right.*

NEW YORK CABLE CO. v. MAYOR, ETC., OF NEW YORK. 259

which then existed, would be to make a new contract for him in place of the one which he made for himself. There may have been a corporation of the same name, and organized for the same purpose, in existence at the time the defendant made his contract; but if so, the contract set out was not made with such existing corporation. That contract was to pay a corporation to be thereafter organized and brought into existence. The ground upon which a party who has contracted with a corporation as such is estopped to deny its existence, is that by his contract he has recognized the existence of the corporation. ?

The contract in question, instead of purporting to be made with an existing corporation, utterly excludes the idea of its present existence, but contemplates the future organization of the corporation, to which he was to pay the amount of his subscription.

The legal effect of a written contract cannot be thus changed by averment or parol evidence.

The petition for a rehearing is overruled.

*If it had taken part in a corp. or hereafter assented to create a corp. as tho it had been duly formed he is liable. 5 Ala 727-730; 22 Conn 426; 67 N.H. 194; 64 N.Y. 185*

13 NEW YORK CABLE CO. v. MAYOR, ETC., OF NEW YORK.

1887. 104 New York, 1.

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 1, 1884, denying a motion on the part of the petitioner, the New York Cable Railway Company, to confirm the report of commissioners appointed by the Supreme Court to determine whether the railways described in the petition of said company ought to be constructed and operated.

The report of the commissioners was in favor of the petitioner. The refusal to confirm their report was upon the ground that the petitioner had no legal right to construct or operate a railway.

RAPALLO, J. . . . *Third.* It is claimed that this court overlooked the authorities cited on the appellants' points, to the effect that a defect in articles of association or in the affidavits annexed thereto, is not fatal to the existence of a corporation or its faculty to acquire franchises, but that the State alone can interpose and take advantage of such defects.

This court did not deem it necessary to comment in its opinion upon those authorities, for the simple reason that we did not deem them applicable to the case at bar. In order to sustain proceedings by which a body claims to be a corporation, and as such empowered to exercise the right of eminent domain, and under that right to take the property of a citizen, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*. Where it is sought to take the property of an individual under powers granted by an act of the legislature to a corporation to be formed in a particular manner therein directed,

the constitutional protection of the rights of private property requires that the powers granted by the legislature be strictly pursued, and all the prescribed conditions be performed. Where the power is conferred upon a corporation, duly formed, it will not be defeated simply because the corporation has done or omitted some act which may be a *cause* of forfeiture of its rights and franchises, for it rests with the State to determine whether such forfeiture will be enforced. Judicial proceedings are necessary to enforce such a forfeiture, and it may be waived. That was the point to which the opinion in the matter of the *Brooklyn, etc., Railroad Company* (72 N. Y. 245), cited by the appellant was directed. It was assumed that this distinction was well understood, and a considerable portion of the opinion of this court in the present case was devoted to showing that the omissions and defects in the organization of the company were failures to comply with the conditions precedent to the existence of the petitioner as a corporation, and the exercise by it of the right of eminent domain, instead of being mere causes of forfeiture of rights acquired.

*See Ill. Wab. Contr. of 12 Ill. 264, 267.*

#### ¶ GUCKERT v. HACKE.

1893. 159 Pennsylvania, 303.

**ASSUMPSIT** against incorporators for debt of corporation.

At the trial before Porter, J., it appeared that plaintiff entered into a contract to make some alterations and repairs in a building occupied by the Hughes & Gawthrop Co. In October, 1890, a certificate of incorporation in proper form was presented by the Hughes & Gawthrop Co. to the governor, asking for a charter. The certificate was approved and letters patent were duly issued. All of the details required by the act of April 29, 1874, P. L. 77, were complied with, excepting only the recording of the certificate in the recorder's office of Allegheny County. The certificate was not recorded until June, 1891. In the mean time, plaintiff, without knowledge of the incorporation, made the contract with Gawthrop, upon which he sued. Subsequently he accepted a note for the debt, signed with the corporate name.

**MR. CHIEF JUSTICE STERRETT.** It is essential to the creation of a corporation under an enabling statute that all material provisions should be substantially followed; and, exemption from personal liability being one of the chief characteristics distinguishing corporations from partnerships and unincorporated joint stock companies, it follows that those who transact business upon the strength of an organization which is materially defective are individually liable, as partners, to those with whom they have dealt. What provisions are material must be gathered from the relation of each to the purpose and scope of the act; and when, therefore, successive steps are pre-

scribed for the creation of corporations, these must obviously be regarded as imperative. Enabling statutes, on the principle of *expressio unius est exclusio alterius*, impliedly prohibit any other mode of doing the act which they authorize; they must be strictly construed: Sutherland on Stat. Construction, sec. 454. Hence it has been uniformly held that requirements in respect of filing charters are imperative: *Childs v. Smith*, 55 Barb. 45; *Smith v. Warden*, 86 Mo. 382; *Abbott v. Smelting Co.*, 4 Neb. 416; Beach on Corporations, sec. 162.

It is plain even from a cursory reading of the act of April 29, 1874, P. L. 77, that recording of the certificate "in the office for the recording of deeds, in and for the county where the chief operations are to be carried on," was intended to be made one of the conditions precedent to corporate existence. That was the last of successive steps required to be taken, and the right to begin the transaction of corporate business was made to depend upon the taking of that step. "From thenceforth," the act expressly declares, the subscribers and their associates and successors "shall be a corporation for the purposes and upon the terms named in the said charter." One of the purposes of the act being exemption from personal liability in the transaction of business, it is obviously material that the public should have notice, and notice by record was accordingly prescribed. Failure to record was failure to comply with one of the express conditions of incorporation, and consequently of exemption from liability.

It may be conceded that had plaintiff dealt with defendants as a corporation he would have been estopped from claiming against them in any other capacity, even though they failed to record their charter: *Spahr v. Bank*, 94 Pa. 429. But it is not pretended that he had any knowledge of the existence of the charter; and there was certainly nothing, either in the name under which they did business or in their conduct, which should have put him upon inquiry. In these circumstances he was amply justified in dealing with them as partners. It was through their default — not his — that they were so treated; and it would be manifest injustice that he should lose his admittedly honest claim.

In the absence of an express agreement the acceptance of a note from the defendants, as a corporation, after plaintiff had performed his part of the contract, cannot operate by way of election or estoppel. The relation of the parties was fixed by their status when the original contract was made, and cannot be changed by gratuitous inference. The members of the alleged corporation were the defendants, and were not injured by the acceptance of the note. The principle which treats the acceptance of a note as additional security to and not as satisfaction of a mechanic's lien (*Jones v. Shawhan*, 4 W. & S. 257) is, with even more justice, applicable here.

It follows from what has been said that the instructions complained of are erroneous.

Judgment reversed and a *venire facias de novo* awarded.

cf 121 Ala 340, 110 Mo 405. acc. 105 Wis 431. 404

Why not let corp do any lawful act - engage in any lawful bus. like a p<sup>ty</sup>  
 1. Sub p<sup>d</sup> in confining corp activity w<sup>th</sup> prescribed limits  
 2. Protect to sh<sup>rs</sup> - & invest<sup>or</sup> public.

It may deal c<sup>on</sup> unauthoriz<sup>d</sup> corp act in 2 ways

1. In fact charter<sup>ed</sup>
2. Refuse to enforce contracts unauthoriz<sup>d</sup> { when corp is p<sup>ty</sup> - loss on Corp  
 when corp is def<sup>endant</sup> - " and.

## CHAPTER V.

22<sup>d</sup> U.V.C. 24 H.L.R. 504. Ex<sup>h</sup> 2 & 3 H.L.R. 495

COLLATERAL ATTACK UPON THE POWERS OF A CORPORATION.  
 HEREIN OF THE EXPRESSION "*ULTRA VIRES*."

(A) *Executory Transactions.*

16 ASHBURY RAILWAY CARRIAGE & IRON CO. v. RICHE. 278

1875. *Law Reports, 7 House of Lords*, 653<sup>1</sup>

MR. JOHN ASHBURY had carried on at two places in *Lancashire* a very extensive business in making railway carriages and waggons, turn-tables, points, crossings, and roofs, and other things of a like sort needed by a railway company, but had not been concerned in the construction of railways themselves.

A company called "*The Ashbury Railway Carriage & Iron Company*," incorporated under the *Companies Act*, 1862, was started for the purpose of buying Mr. *John Ashbury's* business, and among the other articles in the agreement for its purchase was this, that the said *John Ashbury* shall not be interested (except as shareholder in a company) in "the business of a railway-carriage maker, iron manufacturer or contractor, or any other business or branch of business theretofore carried on by him at the said works."

A Memorandum of Association of the company, dated on the 12th of September, 1862, was drawn up. By the 3rd clause of this memorandum of association the objects of the company were thus defined:

Object clause. { "The objects for which the company is established are to make and sell, or lend on hire, railway-carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the

<sup>1</sup> Statement abridged. The arguments of counsel and portions of the opinion of LORD CAIRNS are omitted. The concurring opinions of LORDS CHILMSFORD, HATHERLEY, O'HAGAN, and SELBORNE are omitted. — ED.

business of *mechanical engineers and general contractors*; to purchase and sell, as merchants, timber, coal, metals, or other materials; and to buy and sell any such materials on commission, or as agents."

[Portions of the Articles of Association are set forth in the case.]

In 1864 Mr. *Riche*, the Defendant in Error, was carrying on business in *Belgium*, in partnership with his brother (since deceased) as a railway contractor. On the 14th of March, 1864, the Belgian Government granted to certain persons named *Gillon* and *Bertsoen* a provisional concession for making a line of railway from *Antwerp* to *Tournay*, the payment of two sums of £4000 and £16,000 being settled as what is called "caution money." The two concessionaries desired a company to be formed to carry this concession into effect. It was agreed that Messrs. *Riche* were to have the construction of the line; and in the early part of 1865 the two concessionaries and Messrs. *Riche* and the directors of the *Ashbury Company* met together, and agreed to form a company (*Société Anonyme*) to work the concession. The arrangement was for the *Ashbury Company* to purchase the concession from Messrs. *Gillon* for £70,000, and to give the contract for its construction to Messrs. *Riche*, the company thus becoming, in fact, the contractor for the construction of the line. In this negotiation Mr. *James Ashbury*, one of the directors of the English company, represented that company, and entered into the contracts. Sir *Cusack Roney* afterwards acted in the same character.

The formation of a *société anonyme* in *Belgium*, and the agreement with Messrs. *Riche* that they should construct the line—the *Ashbury* company undertaking to supply the *société anonyme* with the requisite funds—was said to have been adopted because the rails, &c., supplied by a Belgian house would be free from the duty that the Belgian Government imposed on rails imported from *England*, and consequently the profit from the construction of the line would be increased. Messrs. *Riche* began and for some time continued the works for the construction of the line; and for some time, too, the *Ashbury* directors paid, in the name of their company, money to the *société anonyme* to which Messrs. *Riche* had become entitled.

Difficulties about payment arose as the work went on, the English shareholders not adopting the views of their directors as to the speculation.

[The case sets forth various proceedings at meetings of stockholders; the claim being made by plaintiff's counsel that the stockholders of the *Ashbury Company* had ratified the contract entered into in the name of the Company.]

The *Ashbury Company* repudiated the contract for constructing the line as one *ultra vires*. Messrs. *Riche* brought this action for damages for breach of contract. The case was referred to a barrister to state a special case; the Court to be at liberty to draw inferences of fact.

The case setting forth the above matters was first heard before the Court of Exchequer. Two judges against one decided that the verdict

*noseitura a sei*

*Ashbury Corp*  
by agree to  
*Riche* enter  
into a new Corp  
& agree to buy a  
concession to bu  
a Ry in Belg. &  
furnish funds  
to *Riche* to enab  
him to build Ry  
- in effect agree  
to build Ry in  
conjunction w/ *Rid*

*Corp repudiate*



should be entered for the plaintiffs, the Messrs. Riche. L. R. 9 Exch. 224. The case was then taken on error to the Exchequer Chamber. The judges in that Court being equally divided, the judgment of the Court below was affirmed. L. R. 9 Exch. 249. Error was then brought to the House of Lords.

| *Watkin Williams*, Q.C., and *Cohen*, Q.C., for the plaintiffs in error (the original defendants).

*Giffard*, Q.C., and *Benjamin*, Q.C. (*W. G. Harrison* with them), for defendants in error (the original plaintiffs).

LORD CAIRNS, LORD CHANCELLOR.

The action was brought by the Plaintiffs, who appear to be contractors in *Belgium*, and it was brought for damages for the breach of an agreement entered into between the Plaintiffs and the shareholders, constituting the *Ashbury Railway Carriage and Iron Company, Limited*.

These persons constituted a company established under the *Joint Stock Companies Act* of 1862. I think your Lordships will find it necessary to consider with some minuteness some of the leading provisions of that Act of Parliament. But, in the first place, you will find it convenient to ascertain the purposes for which this company was formed, and then the nature of the agreement, or contract, for the breach of which the present action was brought.

[After discussing the above points and quoting from the opinion of *Bramwell*, B., in L. R. 9 Exch. 234.]

My Lords, I agree entirely, both with the description given here by Mr. Baron *Bramwell* of the nature of the contract and with the conclusion at which he arrived, that a contract of this kind was not within the words of the memorandum of association. In point of fact it was not a contract in which, as the memorandum of association implies, the limited company were to be the employed, they were the employers. *Act of* They purchased the concession of a railway — an object not at all within the memorandum of association; and having purchased that, they employed, or they contracted to pay, as persons employing, the Plaintiffs in the present action, as the persons who were to construct it. That was reversing entirely the whole hypothesis of the memorandum of association, and was the making of a contract not included within, but foreign to, the words of the memorandum of association.

Those being the results of the documents to which I have referred, I will ask your Lordships now to consider the effect of the Act of Parliament — the *Joint Stock Companies Act* of 1862 — on this state of things. And here, my Lords, I cannot but regret that by the two Judges in the Court of Exchequer the accurate and precise bearing of that Act of Parliament upon the present case appears to me to have been entirely overlooked or misapprehended: and that in the Court of Exchequer Chamber, speaking of the opinion of those learned Judges

who thought that the decision of the Court of Exchequer should be maintained, the weight which was given to the provisions of this Act of Parliament appears to me to have entirely fallen short of that which ought to have been given to it. Your Lordships are well aware that this is the Act which put upon its present permanent footing the regulation of joint stock companies, and more especially of those joint stock companies which were to be authorized to trade with a limit to their liability.

The provisions under which that system of limiting liability was inaugurated, were provisions not merely, perhaps I might say not mainly, for the benefit of the shareholders for the time being in the company, but were enactments intended also to provide for the interests of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and, secondly, the outside public, and more particularly those who might be creditors of companies of this kind. And I will ask your Lordships to observe, as I refer to some of the clauses, the marked and entire difference there is between the two documents which form the title deeds of companies of this description — I mean the Memorandum of Association on the one hand, and the Articles of Association on the other hand. With regard to the memorandum of association, your Lordships will find, as has often already been pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of the powers of a company to be established under the Act. With regard to the articles of association, those articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, the rights and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is so done is *ultra vires*, not only of the directors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act *extra vires* the directors, but *intra vires* the company.

[Here his Lordship quoted and commented upon various clauses of the Companies Act of 1862.]

The memorandum of association is, as it were, the area beyond which the action of the company cannot go; inside that area the share-

holders may make such regulations for their own government as they think fit.

Now, my Lords, bearing in mind the difference which I have just taken the liberty of pointing out to your Lordships between the memorandum and the articles, we arrive at once at all which appears to me to be necessary for the purpose of deciding this case. I have used the expressions *extra vires* and *intra vires*. I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression "illegality."

In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, "That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company," the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing.

But, my Lords, if the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made. I endeavoured to follow as accurately as I could, the very able argument of Mr. *Benjamin* at your Lordships' Bar on this point; but it appeared to me that this was a difficulty with which he was entirely unable to grapple. He endeavoured to contend that when the shareholders had found that something had been done by the directors which ought not to have been done, they might be authorized to make the best they could of a difficulty into which they had thus been thrown, and therefrom might be deemed to possess power to sanction the contract being proceeded with. My Lords, I am unable to adopt that suggestion. It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the

whole company could not do, and that then, the shareholders finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized.

My Lords, if this be the proper view of the Act of Parliament, it reconciles, as it appears to me, the opinion of all the Judges of the Court of Exchequer Chamber; because I find Mr. Justice *Blackburn*, whose judgment was concurred in by two other Judges who took the same view, expressing himself thus:<sup>1</sup> "I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified." My Lords, that sums up and exhausts the whole case. In my opinion, beyond all doubt, on the true construction of the statute of 1862, creating this corporation, it appears that it was the intention of the Legislature, not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description. If so, according to the words of Mr. Justice *Blackburn*, every Court, whether of law or of equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as *extra vires*, and wholly null and void, and to hold also that a contract wholly void cannot be ratified. they all

My Lords, that relieves me, and, if your Lordships agree with me, relieves your Lordships from any question with regard to ratification. I am bound to say that if ratification had to be considered I have found in this case no evidence which to my mind is at all sufficient to prove ratification; but I desire to say that I do not wish to found my opinion on any question of ratification. This contract, in my judgment, could not have been ratified by the unanimous assent of the whole corporation. g.

I have only to add to what I have already said, that I observe that some cases have been referred to here—those arising out [of] the *Agriculturist Cattle Insurance Company* in your Lordships' House,<sup>2</sup> and the case of the *Phosphate of Lime Company v. Green*, in the Court of Common Pleas<sup>3</sup>—as if they had some bearing on the present question. Those cases have a bearing upon some of the observations with which I have troubled your Lordships. They are cases which illustrate extremely well what I have said just now, that the articles of association of a company of this kind are the documents which define the power of directors as between themselves and the company. In those cases which I have mentioned the whole question was, whether the directors

<sup>1</sup> Law Rep. 9 Ex. 262.

<sup>2</sup> *Spackman v. Evans*, Law Rep. 3 H. L. 171; *Evans v. Smallcombe*, Ibid. 249.

<sup>3</sup> *Houldsworth v. Evans*, Ibid. 263.

<sup>4</sup> Law Rep. 7 C. P. 43.

unlawful contract as void of a public policy & decided by leg? Persons deal & it ought to know & escape authorized ~~public~~ <sup>corp</sup> act. If they make C & C corp outside scope they have voluntarily participated in an illegal transaction? - No relief for them. This is unjust as to Corp & other party but it secures state policy of *Cassenden & Partners v. Williams* (1891)

had gone beyond the powers which were intrusted to them, and by which their authority was limited under the articles of association, or whether that which had been agreed to had been duly performed. In no one of those cases was there any question as to whether the power of the whole company had been exceeded.

Those cases have no application whatever to the present case. The present case stands upon the power, not of the directors alone, but of the whole company as settled by the Act of Parliament.

My Lords, for the reasons which I have thus endeavored to express, I submit to your Lordships and move your Lordships that the judgment in the present case should be reversed, and judgment entered for the Defendants.

# CENTRAL TRANSPORTATION CO. v. PULLMAN'S CAR CO. <sup>enab</sup>

*of up U.V. on both sides. to escape liability or lease - see ref. 36*  
 1890. 130 United States, 24.  
 Secs 2, (63) U.V. of P.

A CORPORATION, formed by articles of association, called a certificate or charter, under the general laws of Pennsylvania concerning manufacturing companies, with a certain capital stock, for twenty years, for "the transportation of passengers in railroad cars constructed and owned by the said company" under certain patents, carried on the business of manufacturing sleeping cars under its patents, and of hiring or letting the cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers. Seven years afterwards, by a special act of the legislature of Pennsylvania, the charter was extended for ninety-nine years, and the corporation was empowered to double its capital stock, and "to enter into contracts with corporations of this or any other State for the leasing or hiring and transfer to them, or any of them, of its railway cars and other personal property." The corporation forthwith entered into an indenture with a corporation of another State engaged in a similar business, by which it leased and transferred to that corporation all its cars, railroad contracts, patent rights and other personal property, moneys, credits and rights of action, for the term of ninety-nine years, except so far as the contracts and patents should expire sooner; and covenanted not to "engage in the business of manufacturing, using, or hiring sleeping cars" while the indenture should remain in force; and the lessee covenanted to pay all existing debts of the lessor, and to pay to the lessor annually the sum of \$264,000, during the entire term of ninety-nine years, unless the indenture should be sooner terminated as therein provided. The question was whether an action could be maintained by the lessor upon this contract to recover the sums thereby payable for a period during which the lessee had enjoyed the benefits of the contract.

1. Corp ed not make it. Can it yet be responsible for it. Murder by proxy.

Corp is responsible for some acts - in the vices C<sup>2</sup> Con: Law make it for re. v.

2. Public int is against it - but it has taken place. No unauthorized. It has permitted it so far as not for public complicit. Shall Courts enforce it int of allowing Corp to escape liability on a C-made 2 Corp & S. of reasoning in Bell. Allaire on Incorp. - of 26 97

3. Pub's must be protected: But if they authorize, C. so far as they ed - 262, 168 of 172.

all such actions shall be maintained in the courts of this State - it is the duty of the courts to protect the public interest.



of it is said I is not prejudiced for he can sue the indiv. aft. the Corp. They not put the burden of recovery on A. a member of Corp vs these aft.

franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff, is unlawful and void, for want of legal capacity in the plaintiff to make it.

A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice Miller in a passage already quoted, where he said that the rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;" and that "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." *Pennsylvania Railroad v. St. Louis, &c., Railroad*, 118 U. S. 317.

\* Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for.

*Judgment affirmed.*

¶ JEMISON v. CITIZENS' SAVINGS BANK. <sup>6n.322</sup>

1890. 122 New York, 135.<sup>1</sup>

APPEAL from General Term of Supreme Court in First Judicial Department, affirming a judgment in favor of defendant.

*Francis C. Barlow*, for appellant.

*Benjamin H. Bristow*, and *William D. Guthrie*, for respondent.

HAIGHT, J. The plaintiffs were commission merchants and members of the Cotton Exchange of the city of New York. The defendant was a savings bank and trust corporation organized under the laws of Texas.

This action was brought to recover commissions, and for money claimed to have been expended for the defendant on the purchase and sale of cotton futures.

The defense was that the defendant, as a savings bank and trust corporation, had no power or authority to deal in the purchase and sale of cotton for future delivery, or in contracts for the purpose of speculation; that in the transaction alleged in the complaint it acted as the agent of one Albert P. Clopton, of Jefferson, Texas, and that the fact that he was the principal for whom the defendant acted was disclosed and well known to the plaintiffs prior to the time of the transaction referred to.

Whilst the fact distinctly appears from the correspondence between the parties that the defendant was acting for "good responsible customers," the General Term was of the opinion that this defense could not be sustained for the reason that the defendant did not disclose the name of its principal at the time of the giving of the orders complained of for the purchase and sale of cotton futures. Had this defense been sustained, the principal and not the defendant, his agent, would have been liable. Without stopping to consider the evidence we shall assume that this defense was not established, and proceed to consider the question as to whether the defendant was liable as principal.

Transactions between the parties commenced in January, 1879, by a letter from J. H. Parsons, as cashier of the defendant, asking the plaintiffs the amount of margin and commission they required for the purchase of cotton futures. The plaintiffs answered, giving the amount, and this was followed by an order by telegraph from Parsons, as cashier, under date of February tenth, to buy 100 bales, June delivery, and on the same day he wrote the plaintiffs that the order was made for one of their customers who had deposited \$250, as per their favor of the twenty-seventh ult. Other orders followed, the final result of which was a loss, to recover which this action was brought. At the time Parsons was the cashier of the defendant, possessing the powers and duties incident to the office under the charter, constitution and by-laws, having the general charge of the business of the bank and the supervision of the

<sup>1</sup> Arguments and part of opinion omitted. — Ed.

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Ex by 20 p  
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concern, and inasmuch as the answer alleges that the transactions referred to in the complaint were had between the plaintiffs and the defendant acting as agent, we shall treat him as possessing all of the authority to act in the premises that the directors of the defendant had the power to give. This brings us to the question whether or not the defendant had the power to make the orders in question.

Whilst the buying and selling of cotton to be delivered in the future, may not ordinarily be immoral or prohibited by any statute, it is not included in the powers given to the defendant by its charter. The transaction in question was prejudicial to its stockholders and tended to endanger and destroy the safeguards provided for the depositors. The stockholders and depositors had the right to have their funds invested in accordance with the provisions of the charter and the Constitution and laws of the state, and in so far as this right was violated by the transaction in question it was a misappropriation of the funds and immoral.

It is contended that the defense of *ultra vires* is not available in this case, for the reason that the contract had been executed on the part of the plaintiffs and that the defendant is estopped from setting up the defense. In the case of *Whitney Arms Co. v. Barlow* (63 N. Y. 62) the plaintiff was a corporation organized for the purpose of manufacturing every variety of fire-arms and other implements of war, and all kinds of machinery adapted to the construction thereof. It entered into a contract with the American Seal Lock Company to manufacture and deliver 10,000 locks. The locks having been delivered, it was held that the contract was fully executed and that the plea of *ultra vires* would not prevail as a defense to an action brought to recover the contract price. We do not question the rule thus invoked. It has been repeatedly declared in other cases, as, for instance, in *Parish v. Wheeler* (22 N. Y. 494), in which it was held that a railroad company having purchased and received a steamboat could be compelled to pay for it, although the power to purchase such boat was not included in its charter. But this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy or immoral. (*Nassau Bank v. Jones, supra*; *P. C. & S. L. R. Co. v. K. & H. B. Co.* 131 U. S. 371-389.)

In the case at bar, the transaction as we have seen was not only immoral and in violation of the rights of the stockholders and depositors, but the defendant had received nothing by virtue of it. The cotton had been purchased by the plaintiffs in their own name, they taking title thereto and holding it upon the defendant's account. It was purchased under the rules of the Cotton Exchange of the city of New York in which the members doing business therein with other members act as principals and are liable as such. The most that can be claimed is that they held the cotton or the contracts therefor subject to the call or

order of the defendant. There had been no delivery of any cotton or property of any kind, or transfer of any title to such property to the defendant. If the steamboat had never been delivered to the railroad company so as to transfer the title thereto, or if the 10,000 locks had never been delivered to the American Seal Lock Company, very different questions would have been presented in the cases to which we have called attention. We consequently are of the opinion that under the circumstances of this case the defence of *ultra vires* is still available to the defendant.

The claim is made on behalf of the appellants that the defendant, in making the orders, acted as an agent for an undisclosed principal, and is, therefore, liable as such. If the defendant had no power to engage in the business as principal we do not understand what right it had to do so as an agent, but conceding that it was an agent and that the orders were made for and on behalf of Clopton, then this action should have been brought against Clopton instead of the defendant. But it is claimed that the defendant neglected to disclose its principal at the time of making the orders and for that reason it is liable; but if it neglected to disclose its principal, so far as this action with the plaintiffs is concerned, it must be regarded as principal and liable as such, and if a principal then the question of *ultra vires* arises. The plaintiffs cannot sustain their action upon the two theories, for they lead in different directions. They cannot proceed upon the theory that the defendant was an agent, for the purpose of avoiding the question of *ultra vires*, and then upon the theory that the defendant was a principal, for the purpose of establishing a right to recover. Undoubtedly a person may in fact be an agent and still bind himself as a principal, but if he is proceeded against as a principal he is entitled to all of the rights and privileges that the law gives to a person occupying that position.

We consequently are of the opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

The law seems to be in N.Y. If Corp has no rec'd - Is anything value of rec'd on  
performance in whole or in part of his side & Contr. It will be given no relief vs Corp.  
Prin. ca. 196 N.Y. 417. 106 N.Y.S. 288

But if Corp has rec'd - Is something in whole or part perf'd of his side & C  
I may have relief vs Corp on C itself to a corresponding extent.

76 BISSELL v. THE MICHIGAN SOUTHERN AND NORTHERN  
INDIANA RAILROAD COMPANIES. <sup>6, 975</sup>

1860. 22 *New York*, 258.

APPEAL from the Supreme Court. The trial was before referees.

The defendant railroads operated a railroad in the State of Illinois. Neither had authority under its charter to operate such railroad. On the 25th day of April, 1853, the defendants took into a train of their cars near Chicago, in the State of Illinois, the plaintiff and his baggage, as a passenger therein, to Toledo, for fare and reward. While the plaintiff was on the defendants' cars, and while being conveyed by them eastward on said road, in the State of Illinois, the defendants' cars were run carelessly, at a hazardous speed at the crossing of the Illinois Central Railroad, and the road occupied and run by the defendants; by means whereof the defendants' cars run into and came in collision with a train of cars then running on the Illinois Central Railroad, across the said road owned and occupied by the defendants, and a passenger car of the defendants', which the plaintiff occupied, was broken to pieces, and the plaintiff damaged and injured in his person and property.

The referees reported in the plaintiff's favor for \$2,500, for which judgment was entered; and such judgment having been affirmed at general term in the sixth district, the defendants appealed to this court.

*Charles Tracy*, for the appellants.

*Amasa J. Parker*, for the respondent.

COMSTOCK, Ch. J. A general statement of the plaintiff's case is, that the two corporations defendant were jointly engaged in the business of carrying passengers and freight between Chicago and Lake Erie, through a part of the State of Illinois, and through the States of Indiana and Michigan, by three connected railroads which they owned or controlled, and the business of which was managed under a consolidated arrangement which had been in force between the defendants for some time previous to the injury complained of; that, being so engaged, they undertook and assumed to carry him, the plaintiff, as a passenger from Chicago, or a point near that place, eastward over the consolidated line of road; that he took his seat in their cars accordingly, and that during the transit he was injured by an accident which happened through their carelessness and neglect. Assuming the truth of this statement, there is no doubt of the plaintiff's right to recover. But the defendants deny the legal truth of these facts, because one of the companies was chartered by the legislature of Michigan, with power to build a road in that State, and the other by the legislature of Indiana, with power to build one in that State. They both insist that they had no right or power under their respective charters to consolidate their

business in the manner stated, and especially that they could not legally, either separately or jointly, acquire the possession and use of a connecting road in the State of Illinois and undertake to carry passengers or freight over the same. They do not deny that their boards of directors and agents, duly authorized to wield all the powers which the corporations themselves possessed, entered into the arrangements which have been mentioned, nor that, in the execution of those arrangements, they made the contract with the plaintiff to carry him as a passenger; nor do they deny that they received the benefit of that contract in the customary fare which he paid. Their defence is, simply and purely, that they transcended their own powers and violated their own organic laws. On this ground they insist that their business was not, in judgment of law, consolidated; that they did not use and operate a road in Illinois; that they did not undertake to carry the plaintiff over it; and did not, by their negligence, cause the injury of which he complains; but that all these acts and proceedings were, in legal contemplation, the acts and proceedings of the natural persons who were actually engaged in promoting the same.

Can then two railroad corporations, having connecting lines, thus unite their business, for the purpose of promoting their common interest: charter another connecting road in furtherance of the same policy: hold themselves out to the public as carriers over the whole route: enter into contracts accordingly: receive the benefit of those contracts; and then, when liabilities arise, interpose the violation of their own charters to shield them from responsibility? Such a defence is shocking to the moral sense, and although it appears to have some support in judicial opinions, I think it has no foundation in the law.

The doctrine has certainly been asserted on some occasions, that, in all cases where the contracts and dealings of a corporation are claimed to be invalid for want of power to enter into the same, a comparison must be instituted between those contracts and dealings and the charter, and, if the charter does not appear to embrace them, then that they must be adjudged void to all intents and purposes, and in all conceivable circumstances. The reasoning on which this doctrine has been usually claimed to rest, denies, in effect, that corporations can, or ever do, exceed their powers. They are said to be artificial beings, having certain faculties given to them by law, which faculties are limited to the precise purposes and objects of their creation, and can no more be exerted outside of those purposes and objects than the faculties of a natural person can be exerted in the performance of acts which are not within human power. In this view, these artificial existences are cast in so perfect a mould that transgression and wrong become impossible. The acts and dealings of a corporation, done and transacted in its name and behalf by its board of directors, vested with all its powers, are, unless justified by its charter, according to this reasoning, the acts and dealings of the individuals engaged in them, and for which they alone are responsible. But such, I apprehend, is not the nature of

reference - share  
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these bodies. Like natural persons, they can overleap the legal and moral restraints imposed upon them: in other words, they are capable of doing wrong. To say that a corporation has no right to do unauthorized acts, is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err, is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons.

Arg from  
necessity

I think this doctrine of theoretical perfection in corporations would convert them practically into most mischievous monsters. A banking institution, through its board of directors, may invest its funds in the purchase of stocks or cotton, and every holder of its stock may acquiesce, expecting to profit by the speculation. If the enterprise is successful, the corporation and its stockholders gain by the result. If a depression occurs in the market, and disaster is threatened, the doctrine that a corporation can never act outside of its charter enables it to say, "this is not our dealing," and the money used in the adventure may be unconditionally reclaimed from whatever parties have received it in exchange for value; while the injured dealer must seek his remedy against agents perhaps irresponsible or unknown. Corporations may thus take all the chances of gain, without incurring the hazards of loss. Familiar maxims of the law must be reversed. In the relation of private principal and agent, the adoption of an agent's unauthorized dealing is equivalent to an original authority; and the adoption is perfect when the principal receives the proceeds of that dealing. Corporations may practically act in the same manner. The proceeds of unauthorized adventures may be received and become blended with their legitimate business and funds so as to be wholly undistinguishable; but, as the adventures themselves were, in judgment of law, impossible, considered as corporate transactions, so they cannot become possible upon any principle of ratification or estoppel. If we say there is an utter absence of power or faculty to engage in the dealing, it is a self-evident proposition that no rule of estoppel can change the result.

Not necessary

It is not uncommon, in charters of corporations, to lay express prohibitions upon them as a limitation of their powers, having in view the maintenance of some public policy; as, for example, prohibitions relating to the currency of the State. If they violate these prohibitions, they have been supposed to be public offenders, and on that ground the law has always denied to them its remedial processes either in affirmance or disaffirmance of their unlawful contracts; thus regarding them as private offenders are regarded. But this rule of law must be overthrown, if we admit this theory of constitutional inability in corporations to overstep the limits of rightful power. In the case of *The Life and Fire Insurance Company v. The Mechanics' Fire Insurance Company* (7 Wend., 31), it was contended that a certain corporate transaction, if unlawful, was to be regarded as the act of the

agents or officers of the company, and not of the company, and, therefore, that the company should be allowed to recover back the money or property improperly disposed of. That doctrine was refuted by Mr. Justice SUTHERLAND in this language: "This would be a most convenient distinction for corporations to establish—that every violation of their charter or assumption of unauthorized power on the part of their officers, although with the full approbation of their directors, is to be considered the act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established." These remarks suggest an unanswerable argument against the doctrine. Why, it may be asked, does the law provide the remedy by *quo warranto* against corporations for usurpation and abuse of power? Is it not the very foundation of that proceeding, that corporations can and do perform acts and usurp franchises beyond the rightful authority conferred by their charters? Most assuredly this is so. The sovereign power of the State interposes, alleges the excess or abuse, and on that ground demands from the courts a sentence of forfeiture.

One of the sources of error in reasoning upon legal as well as other questions, is, inexactness in the use of language, or, perhaps, in the perfectness of language, to express the varieties of thought. It is a self-evident truth, that a natural person cannot exceed the powers which belong to his nature. In this proposition, we use words in their literal and exact sense. In the same sense, it is a truth equally evident that a corporation cannot exceed its powers; but this is only asserting that it cannot exercise attributes which it does not possess. As an impersonal being, it cannot experience religious emotion, or feel the moral sentiments. Corporations are said to be clothed with certain powers enumerated in their charters or incidental to those which are enumerated, and it is also said they cannot exceed those powers; therefore, it has been urged that all attempts to do so are simply nugatory. The premises are correct when properly understood; but the conclusion is false, because the premises are misinterpreted. When we speak of the powers of a corporation, the term only expresses the privileges and franchises which are bestowed in the charter; and when we say it cannot exercise other powers, the just meaning of the language is, that as the attempt to do so is without authority of law, the performance of unauthorized acts is a usurpation which may be a wrong to the State, or, perhaps, to the shareholders. But the usurpation is possible. In the same sense, natural persons are under the restraints of law, but they may transgress the law, and when they do so they are responsible for their acts. From this consequence corporations are not, in my judgment, wholly exempt. The privileges and franchises granted are not the whole of a corporation. Every trading corporation aggregate includes an association of persons having a collective will, and a board of directors or other agency in which that will is embodied, and through

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which it may be exerted in modes of action not expressed in the organic law. Thus, like moral and sentient beings, they may and do act in opposition to the intention of their creator, and they ought to be accountable for such acts.

A great variety of cases might be supposed, in which this doctrine of corporate exemption from liability could not be defended upon any rule of reason or principle of justice. But perhaps none of them would afford a more persuasive illustration than the one now under consideration. Let us look at the facts and consider the results. These corporations had boards of directors in whom were vested every power, faculty or function which belonged to the bodies they represented. We have then no question in the law of agency; for the agents, if that be the proper term, had all the powers of the principals. Indeed, in an important sense, they were the principals; because their authority was not received by delegation from any other principal. These boards proceeded to consolidate the two lines of road, and they included in the scheme another connecting road. This being done, they entered into all the relations of carriers with the public, and the entire business of both companies was thus conducted for a period of several years, with no complaint on the part of the State sovereignties which granted the charters, and none on the part of the shareholders. All the gains and profits of the business were received to the use of the corporations, and it is to be assumed that the shareholders were benefited thereby. The question arises, where were these companies and what were they doing during all this period? The question would be the same if that mode of conduct were to continue without limit of time. If the acts mentioned were in excess of the powers granted, and if we concede the doctrine that such acts are in all circumstances to be imputed to the agents who perform them, the conclusion follows, that the corporations became virtually extinct by a non-user of their franchises. If the business thus conducted was not the business of the companies, they were engaged in none whatever, and thus, practically, if not legally, ceased to exist. If it was the business of the directors as natural persons, then those persons must be deemed not only to have taken a wrongful possession of all the estate and funds of the corporations they professed to represent, but also to have usurped their franchises, and to have stolen their corporate names and seals. If this be the legal interpretation of the course of dealing and conduct actually carried on under the acts of incorporation passed by the legislatures of Michigan and Indiana, then the companies might have been proceeded against by those States, not on the ground of a usurpation of powers and privileges which did not belong to them, but for a total non-user of the franchises which did belong to them; while, on the other hand, writs of *quo warranto* might have been issued against the individual directors and agents for usurping corporate rights without any charter at all. (16 Wend., 655; 23 id., 193; 3 Bl. Com., 263.) These conclusions are not founded in any known principle or practice, and they are totally opposed to the facts

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of the case. In rejecting them, we must also reject the theory of corporate perfection and immunities on which they were based; and we are compelled to hold that those companies, as legal and accountable persons, engaged themselves in the business of carrying passengers and freight under and according to the arrangements which have been mentioned, and thereby placed themselves in that relation to the public, and to the plaintiff in particular, which is the subject of the present controversy.

Conclusion as to first defense

But the doctrine, that corporations can never be bound by engagements not justified by the grant of power from the State, is next defended on a different ground. Although it be conceded that they are present, and acting as legal persons, or entities, when such engagements are entered into, it is said that all contracts in excess of the rightful power possessed by corporations are illegal and therefore void. This is an argument totally different from the one which has been so far examined, because it necessarily imputes the making of the contract to the corporate person or being; whereas, the doctrine which I have endeavored to refute denies that proposition. The very point of the supposed illegality consists, or at least it may consist, in the performance of acts perfectly lawful in themselves, but which, being done by a corporation, and not by individuals, are pronounced illegal because they are so done without authority contained in the charter.

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But is it true that all contracts of corporations for purposes not embraced in their charters are illegal, in the appropriate sense of that term? This proposition I must deny. Undoubtedly such engagements may have the vices which sometimes infect the contracts of individuals. They may involve a *malum in se* or a *malum prohibitum*, and may be void for any cause which would avoid the contract of a natural person. But where no such vices exist, and the only defect is one of power, the contract cannot be void because it is illegal or immoral. Such a doctrine may have some slight foundation in the earlier English railway cases (*The East Anglian Railway Co. v. The Eastern Counties Railway Co.*, 7 Eng. Law and Eq., 509; *McGregor v. The Deal and Dover Railway Co.*, 16 id., 180); but it was never established, and is not now received in the English courts. (*The Mayor of Norwich v. The Norfolk Railway Co.*, 30 Eng. Law and Eq., 120; *Eastern Counties Railway Co. v. Huxkes*, 35 id., 8, 37.) The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but with the slight exception named, there is an entire absence, not only of adjudged cases, but of even judicial opinion or dicta, for the proposition that mere want of authority renders a contract illegal. Such a proposition seems to me absurd. The words *ultra vires* and illegality represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority

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of the board of directors and under the corporate seal, for the building of a church or college or an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated. So a manufacturing corporation may purchase ground for a school house or a place of worship for the intellectual, religious and moral improvement of its operatives. It may buy tracts and books of instruction for distribution amongst them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although *ultra vires*, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no State policy in restraint of that business.

To illustrate the subject in another manner: An agent may make a contract in the name and behalf of his principal, but not within the scope of his agency. If the consideration and purpose of such a contract be lawful, it may be void as against the principal, but not on the ground of illegality. A corporation is not an agent of the State, or, in any strict sense, of the shareholders. But it derives its powers from the State, and it may transcend those powers for purposes which, in themselves considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal, because they violate no public interest or policy. My meaning, in short, is that the *illegality* of an act is determined in its quality and does not depend on the person or being which performs it.

There has been, I think, some want of reflection, even in judicial minds, upon the reasons and policy which mainly govern in the granting of charters to corporations, with certain specified powers and no others. A private or trading corporation is essentially a chartered partnership, with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy. It is also something more than a partnership, because the legal or artificial person becomes vested with the title to all the estate and capital contributed, to be held and used, however, in trust for the shareholders. Now, in a well regulated unincorporated partnership, the articles entered into by the associates specify the objects of their association. But, suppose the same associates desire a charter of incorporation for the more convenient prosecution of the same business, and obtain one. We shall find it to contain the like specification, which becomes the grant of power from the sovereign authority of the State. I am speaking of powers and privileges granted which are not, in their essential nature, corporate or public franchises, as distinguished from the private enterprises which any class of citizens may embark in; and, with the exception of municipal or governmental charters, the class of powers here referred to will be found to cover

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nearly the whole field of corporate rights. It is not difficult, then, to see the reason and policy which underlie such grants. The associates ask for a charter in order to carry on their business with greater advantages; and the same reason exists for a specification of the purposes of their organization as in the case of an association without a charter. The charter takes the place of the articles of agreement, and becomes the appropriate rule of action. No public interest or policy is involved, because the objects of the grant are not of a public nature. The powers and rights specified are identical with those which any private person or association of persons may exercise. If those who manage the concerns of a simple partnership deal with the funds in a manner or for purposes not specified, their acts are *ultra vires*; and if the directors of such a corporation, as I am here speaking of, do the same thing, their acts are also *ultra vires* in the same sense and no other. To apply the word "illegality" to such transactions, is to confound things of a totally different nature. It is only private interests which are affected by them; and there is no statute or rule of the common law by which they become public offences. l.

In every treatise upon the law of contracts — and there are many of them — we shall find an enumeration of such as are immoral or illegal; but amongst them cannot be found a specification of the promise or agreement of a corporation, founded on a lawful consideration, and to do that which in itself is lawful to be done, although not within the powers granted. It has always been supposed, and to that effect are all the authorities, that contracts are illegal either in respect to the consideration or the promise. Where both of these are lawful and right, the maxim, "*ex turpi contractu non oritur actio*," can have no application. The incapacity of the contracting party, whether it be a corporation, an infant, a *feme covert*, or a lunatic, has nothing to do with the legality of the contract, in that sense of the word which is now under discussion. So, in the treatises upon corporations, we shall find their rights and privileges to be very extensively considered, but nowhere an intimation that their dealings outside of their charters are deemed illegal for that cause. Even the proceeding against them by *quo warranto*, for the exercise of ungranted powers, will illustrate the subject. This is a civil, and not a criminal proceeding, and its object is purely and solely to try a civil right. (2 Kyd on Corporations, 439; Angel & Ames, 686; 1 Serg. & Rawle, 385; 3 Dallas, 490; 1 Blackf., 267.) Our statute on this subject makes it the duty of the Attorney-General to institute the proceeding, under leave of the court, when the case is one of public interest, but, in other cases, only at the instance of private parties claiming to be aggrieved by the abuse of power, and on security being given to indemnify the State. (2 R. S., 583, §§ 39, 40.) In any case, whether the suit be founded on the alleged usurpation of a public or corporate office, or on the non-user or misuser of the franchises granted to a corporation, it is purely a civil right which is tried, and the judgment is not penal, but simply one of ouster from the

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right claimed. The legislature may, and sometimes does, expressly prohibit the doing of certain acts by corporations, having in view the promotion of some particular policy of the State, and may declare such acts to be public offences, to be punished by fine or imprisonment of the parties engaged in them. There are such laws in regard to incorporated as well as private banks, the object of which is to protect the currency of the State. But where there are no such penalties or prohibitions, and the dealings of a corporation have no relation to State policy, but are such as all mankind may freely engage in, the law has provided no punishment for such dealings, because it does not regard them as a violation of its principles and enactments in any sense which is material to the present inquiry. I do not deny that there is, in a different sense, a legal wrong in the misapplication of the corporate capital and funds; and so there is in every breach of trust or violation of contract. But the true inquiry here is, whether it belongs to the class of public, as distinguished from private wrongs, so that the guilty party may set it up in avoidance of just obligations; and whether the courts must, in all circumstances, accept that defence without regard to the situation and rights of the other party. I cannot believe such to be the rule of reason or of law.

Let us now concede that the unauthorized contracts of a corporation are illegal in the sense contended for. It by no means follows that they are never to be enforced. An agreement declared by statute to be void cannot be enforced, because such is the legislative will. But when, without any such declaration, it is simply illegal, it is capable of enforcement where justice plainly requires it. Circumstances may and often do exist, which estop the offender from taking advantage of his own wrong. The contract may be entered into on the other side without any participation in the guilt, and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract. A railroad corporation, for example, may purchase iron rails and give its obligation to pay for them with a design to sell them again on speculation, instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is, therefore, said to be illegal. But if the corporation is deemed to make the contract — in other words, if, as I have above shown, it is a legal possibility for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party who knows nothing of the unlawful purpose? So an incorporated bank may purchase land, having power to do so for a banking house, but actually intending to speculate in the transaction. This is also *ultra vires*, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being *in pari delicto*? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals.

As I am not contending that the unauthorized dealings of a corpora-

tion are never to be questioned, the object of this discussion has been to ascertain the true ground on which they can be impeached where they are not attended by the vices which are fatal to private contracts also. I have shown, I trust, 1. That such dealings are possible in law, as they often take place in fact: in other words, that it is in the nature of these bodies to overleap the restraints imposed upon them. 2. That a transgression of this nature is a simple excess of power (using that word to express the rules of action prescribed in their charters, and by which they ought to regulate their conduct), but is not tainted with illegality so as to avoid the contract, or dealing, on that ground. This proposition, it seems hardly necessary to repeat, is applied only to transactions which involve or contemplate no violation of the code of public or criminal law, but, on the contrary, are innocent and lawful in themselves. 3. Even illegal contracts, in the proper sense, are not, universally and indiscriminately, to be adjudged void; and, especially, this is not so where the offender alleges his own wrong to avoid just responsibility, the other party being innocent of the offence.

If these negative conclusions cannot be denied, it follows that contracts and dealings, such as I have been speaking of, are to be condemned by the courts only on the ground that they are a breach of the duty which private corporations owe to the stockholders to whom the capital beneficially belongs. It is the undoubted right of stockholders to complain of any diversion of the corporate funds to purposes unauthorized in the charter. This, as a general principle, cannot be too strongly asserted; and by this principle, justly applied to particular instances, the question in such cases is to be resolved. The original subscribers contribute the capital invested, and they and those who succeed to their shares are always, in equity, the owners of that capital. But, legally, the ownership is vested in the corporate body, impressed with the trusts and duties prescribed in the charter. In these relations we have the only true foundation of the plea of *ultra vires*. That term is of very modern invention, and I do not think it well chosen to express the only principle which it can be allowed to represent in cases of this nature. It is not to be understood as an absolute and peremptory defence in all cases of excess of power, without regard to other circumstances and considerations. It is not to be looked upon as a plea which denies the actual exertion of corporate power when a corporation enters into an engagement which, according to its charter, it ought not to make; but, because such was the nature of the contract, it presents the breach of trust or duty to the shareholders as an excuse for the non-performance. And I do not deny the validity of this excuse in many cases, I may say in all cases where it can be received without doing greater injustice to others. If the person dealing with a corporation knows of the wrong done or contemplated, and he cannot show the acquiescence of the shareholders, he ought not to complain if he cannot enforce the contract. Aside from the law of corporations, agreements which involve or propose a violation of trust will not be

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enforced by the courts where no greater equities demand it. Corporate bodies are more than mere agents. They are more than a partner who manages as the agent of his associates. Their powers are undelegated. They are the legal owners of the capital, or estate, and they have capacity to deal with it in contravention of duty or trust.

But the equitable rights of shareholders will enable them, in many circumstances, to claim the affirmative interposition of the courts to arrest an unauthorized course of dealing, or to prevent a threatened diversion of the capital to improper uses. Of this character are many of the cases usually cited, to prove that corporations cannot exceed their powers. (*Dodge v. Woolsey*, 18 How. U. S. 331; *Rolf v. Rogers*, 3 Paige, 154; *Angel & Ames on Corp.*, 424, 4th ed., and cases cited.) So, too, it is plain, without citing authority, that a stockholder, who can show that he has sustained a pecuniary loss by such a use of the capital, may have his redress in damages against the individuals who commit the wrong, unless he has himself acquiesced. These are extensive, and, it would seem, ample remedies to prevent or redress the abuse of power; and it appears to me a much higher and better policy, that the private shareholders should be confined to these remedies, than to sacrifice the interests of the rest of community by conceding to these bodies absolute immunity whenever power is thus abused. But the principles which belong to this question need not present that naked alternative. In many cases no injustice will be done by receiving the plea of *ultra vires*, when defensively interposed by the corporation itself. But these are cases where a want of good faith can be imputed to the dealer, and where the defence, if allowed, will leave the parties substantially in the enjoyment of their previous rights. An artificial, not less than a natural person, having the title and possession of an estate which, in equity, belongs to others, and entering into engagements inconsistent with duty or trust, should have a *locus penitentiae*, where it can be allowed without manifest wrong to others. It may be difficult to lay down a rule so general and so exact as to include every case; but the principles and analogies of the law will be sufficient for the solution of such questions as they arise. Justice, not only in this, but in very many other cases of constant occurrence, can be administered according to law, if I have succeeded in showing, negatively, that a comparison of the charter of a corporation with what it actually does is not always the test of liability.

It is said that there will be no restraint upon the acts and dealings of corporate bodies, if we uphold them when in excess of rightful authority. To this I answer, that the most ample restraints will be found in the principles here advocated; while, on the other hand, if we concede to corporations immunity in all cases when they do wrong, we invite and reward the very abuse. It is also said, in order to render this doctrine less offensive to the reason and conscience, that the innocent dealer may, upon the voidness of the contract and a disaffirmance of it, recover back the value or consideration with which he has parted. This position

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necessarily concedes that the corporation, as a legal person, made the unauthorized contract, and received the money, or value, under and according to it; thus overthrowing the main objection to its liability to respond directly upon the contract. It also concedes the innocence of the other contracting party; thus, according to all the analogies of the law, refuting the only other objection (illegality) on which the absolute invalidity of such dealings is claimed to rest: for, surely, after conceding that the corporation actually made the contract, it will not be contended that it can set up that it ought not to have made it, against an innocent person who has given up his money or property on the faith of the same contract. But I answer, further, that while in many cases the remedy of a suit in disaffirmance of the agreement, and to recover back the consideration, will be sufficient to prevent wrong, in many others it will be entirely worthless. All collateral securities must fall to the ground with the principal contract, and all its consequences and results. The present case will afford the best illustration. The defendants, in consideration of a trifling sum received from the plaintiff for fare, agreed to perform the service of carrying him in their cars, perhaps some two hundred miles. By the negligent performance of that agreement, they inflicted on him injuries for which a jury has said the proper compensation was \$2,500. This being the measure of damages for the breach of the contract, the absurdity, not less than the injustice, of confining him to the remedy of disaffirmance because the agreement was *ultra vires*, must be quite apparent.

I have examined these questions with the more attention, because, aside from their bearing on the present controversy, they are of great practical importance. A vast amount of the business of the community has come to be carried on under corporate forms of organization. Besides innumerable special charters, we have general laws which impart corporate attributes to associations formed according to articles of agreement, for a great variety of purposes. When we consider these to be any less than partnerships, with the superadded privileges of succession, of a corporate seal, &c., we forget that corporations are no longer confined to the exercise of public or political franchises. These commercial, manufacturing, and trading bodies are brought into relation with almost every member of the community; and I think it greatly to be desired that, in laying down the rules of law which are to govern in such relations, we should avoid a system of destructive technicalities. Those rules should be founded in the principles of justice which are recognized in other and analogous dealings among men.

If we could find the law to be settled in the manner which must be and is contended for in order to exonerate the defendants in this case from responsibility, it would be our duty to follow it. But such is not the case. There are, certainly, judicial opinions, and some adjudged cases, which countenance the extreme doctrines on which the defence must rest. Among these cases, a leading one is that of *Hood v. The New York and New Haven Railroad Company* (22 Conn., 502).

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That case appears to go the length of holding that corporations cannot and never do perform acts in excess of their powers. No authority was cited for such a proposition, and it cannot, as I think I have shown, be maintained. Another extreme authority is, *Pearce v. The Madison and Indianapolis Railroad Company* (21 How. U. S., 442), where it appeared that a corporation, in furtherance of its general objects, although, strictly speaking, in excess of its powers, had entered into an engagement upon a consideration which it had received and appropriated. It was allowed to repudiate that engagement; but the principles of the question were not much discussed. A considerable number of other cases and *dicta*, of a character less marked, but tending in the same direction, might be referred to. But, on the other hand, there are well-considered authorities which sustain the principles advocated in this opinion. (*The Steam Navigation Co. v. Weed*, 17 Barb., 378; *The Silver Lake Bank v. North*, 4 Johns. Ch., 370; *The Chester Glass Co. v. Dewey*, 16 Mass., 94, 102; *The Bank of Genesee v. The Patchin Bank*, 3 Kern., 309, 314; *Bulkley v. Derby Fishing Co.*, 2 Conn., 252, 255; *Parker v. The Boston and Maine R. R.*, 3 Cush., 107, 108; *Alleghany City v. McClurkan et al.*, 14 Penn., 83; 29 Verm., 93.) In the case from 2d Connecticut, it was said: "A corporate body, by transgressing the limits of its charter, may doubtless incur a forfeiture of its privileges and powers; but who ever imagined that it could thus acquire immunity to the prejudice of third persons?" It will be found, indeed, that such a doctrine is of very modern origin. In the case from 14th Pennsylvania, COULTER, J., observed: "It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is a power to contract, undoubtedly; and if a series of contracts have been made, openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank, which has been long in the habit of doing business of a particular description, would not be exonerated from liability because such business was not expressly authorized in its charter. The object of all law is to promote justice and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the acts of its accredited agents, even not expressly authorized, when these contracts for a series of times were entered into publicly and in such a manner as, by necessary and irresistible implication, to be within the knowledge of the corporators." "One rule of law," he adds, "is often met and counterchecked by another of equal force, so that, although the corporators are, in general, protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that they should not deceive the public or lead them to trust and confide in the unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them." A more particular discussion of the authorities on either

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side, would not be profitable. The general question is one which ought to be considered on principle; and I have so viewed it, because I find no settled rule which stands in the way of such an examination.

But little more need be said in reference to the particular case now before us. If the defendants did not become liable for the breach of their undertaking to carry the plaintiff, or of their duty resulting from that undertaking, I can see no ground for holding them accountable as simple wrongdoers. If their contract was *ultra vires*, and that defence to an action upon it must be received as absolute and peremptory—if no principle of estoppel or rule of justice can be urged against that defence—then it is more clear that the simple wrong to the plaintiff's person was also *ultra vires*. It was with considerable difficulty that the liability of a corporation in any case for a pure tort was ever established; and they are never so liable except when engaged in the performance of some duty or undertaking in respect to which accountability arises. If the defendants' express undertaking was absolutely void, so that no duty could arise thereupon, the implied undertaking resulting from the actual attempt to carry the plaintiff as a passenger is encountered by the same objection; and there is nothing left of the transaction except a pure and simple tort, committed by the defendants' servants while not engaged in any business which could bring responsibilities upon the defendants themselves. I think it plain that this theory of liability will not sustain the plaintiff's case.

But I have no hesitation in affirming the judgment of the court below, upon the principles of contract and of duty resulting therefrom. That the entire course of business in which the defendants were engaged could not be justified by their charters, I am not prepared to deny. Each of them was chartered to build a railroad, the termini of which were specified. They built the roads, and then consolidated their business. The common interest might thus be promoted; but it is difficult to affirm that the charter of either authorized its capital to be thus blended with that of the other. It is equally difficult to hold that they had any rightful authority to construct or lease another road in continuation of the line. But these things were actually done, and they were done openly and publicly. If these acts were an abuse of power, the shareholders had ample opportunity to prevent or arrest the abuse. But no complaint from them has ever been heard, and their acquiescence must be presumed. If State sovereignties were wronged by the course of dealing pursued, no interference or complaint has come from that quarter. Conceding, then, that the defendants might change the attitude in which they stood toward the public, and return at any time to the sphere of legitimate duty, they could not revoke past contracts, the consideration of which they had received, and upon the performance of which they had entered. They were bound to pay their servants and laborers, and they were liable for the careful transportation of freight committed to their charge. They could not invite a traveler into their cars, and, after injuring him by their negligence, reject the

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responsibilities of their contract. A traveler from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations. The present case, in short, plainly falls within the principles of corporate liability herein asserted, and the defendants must respond to that liability. The judgment should be affirmed.

SELDEN, J. It was not strenuously insisted upon the argument that the acts of these two railroad companies in entering into the arrangement found by the referee, and in running their cars upon joint account through the States of Ohio, Indiana and Illinois, were authorized by law; nor have I been able to find in the statutes of those States any sufficient warrant for these acts. I shall assume, therefore, that in undertaking to carry the plaintiff from Chicago, in the State of Illinois, to Toledo, in the State of Ohio, the defendants exceeded their corporate powers; and, as the allegation in the complaint, of carelessness and negligence on the part of the defendants, or their agents, is fully sustained by the finding of the referee, the defence must rest exclusively upon this want of power. The counsel on both sides have treated the action as founded upon contract, and in that aspect of the case the question arises whether want of authority on the part of a corporation, to enter into any engagement, is a valid defence to such corporation when sued for its violation.

This question has not until lately attracted much attention. But the recent rapid multiplication of these artificial bodies, and the extensive powers and privileges conferred upon them, have made it a question of importance. It has, within a few years past, been repeatedly presented to the courts, both in this country and in England, and with one unvarying result. I cannot, myself, regard it, therefore, as in any just sense open to discussion. If questions, which have been over and over again considered, and over and over again decided, are to be treated as still unsettled, then are we without any stable foundation of law or justice. The evils attendant upon setting legal principles afloat upon a sea of uncertainty and doubt, and causing them to depend upon the fluctuations of individual opinion are too obvious to need enumeration. Confidence in courts is only to be retained by their exhibiting stability in their own decisions, and a becoming respect for those of other tribunals. It has been so often and so uniformly decided that corporations are not bound by contracts which are clearly *ultra vires*, that to hold the contrary now would take the legal profession by surprise, and introduce more or less confusion into this important branch of the law.

But, while I protest against considering this as an open question, and insist that it should be treated as settled by authority, I also maintain that the numerous decisions on the subject by both the English and the American courts, rest upon a solid foundation of reason and principle. Much of the apparent force of the arguments used to prove the contrary, is produced by substituting entirely false basis for those decisions. If they really rested, as has been sometimes

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supposed, upon the ground that because corporations are artificial beings, having no natural powers, but only such as are conferred upon them by law, they cannot by possibility do any act beyond the limits prescribed by their charters; and hence that no such act, although done by their agents, in their name, and for their benefit, can be considered as a corporate act, but must in all cases be treated as the personal act of such agent, it would, indeed, be easy to show their fallacy. This would be, as is justly said, to attribute to them a degree of perfection that belongs to no earthly existence, whether natural or artificial. To present this as the true foundation of the rule, which exempts corporations from liability for their unauthorized acts, is entirely to misapprehend the whole doctrine on the subject.

No court has ever held that the defence of *ultra vires* rested upon any such ground, as that the contract sought to be enforced could not be considered as an act of the corporation. The object of the distinction, so frequently drawn, between natural persons and corporations as mere artificial existences with no powers or faculties except such as are derived from their charters, is simply to show that the latter cannot legitimately and rightfully exercise any powers but those with which they are endowed by the law which creates them, and not that they may not wrongfully exceed the just limits of those powers. The case of *Barry v. The Merchants' Exchange Company* (1 Sandf. Ch. R., 280), will serve to illustrate the force and application of the distinction. The question in that case was, whether a corporation, created for the purpose of erecting a building to be used as a public exchange, in the city of New York, had power to borrow money to enable it to accomplish the object of the incorporation, no provision conferring this power being contained in the charter. The Vice-Chancellor, in deciding this question in the affirmative, said: "Every corporation, as such, has the capacity to take and grant property, and to contract obligations *in the same manner as an individual*." This remark presents one theory in regard to the nature of corporations, which is, that unless specially restrained, they have the same power to bind themselves by contract as any natural person. The distinction referred to stands opposed to this theory, and is designed to show, that as corporations have no existence independent of their charters, they can, of course, have no powers except such as are specifically conferred.

When a corporation, sued for a breach of contract, sets up as a defence its own want of power to enter into the contract, two questions are involved: first, whether the contract was, in truth, beyond the corporate powers; and, second, if so, whether this is available as a defence. It is only in reference to the first of these questions, and to prove that the contract was really *ultra vires*, that the argument has been resorted to, that a corporation has no natural powers. The excess of power being established, the question, whether this constitutes a valid defence, depends upon entirely different considerations.

The assumption, therefore, that the doctrine, which declares the

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exercising its powers

unauthorized contract of a corporation to be void, rests in any degree upon the theory that a corporation can never be said to have done anything but what it had a legitimate right to do, is wholly unwarranted; and, hence, the irresistible logic with which it is shown that corporations must necessarily partake of the imperfection which attaches to all created things, is wholly without force in its application to the present case. Corporations, as well as natural persons, may, no doubt, err. They may exceed their powers and violate their charters, and may be held responsible for so doing. Were it otherwise, they could never be made liable for a tort; nor could they be proceeded against by *quo warranto*. The statute which authorizes the Attorney-General to file an information in the nature of a *quo warranto* against an offending corporation (2 R. S., 583, § 39), assumes that corporations may transgress the limits prescribed by their charters. Subdivision 5 of the section referred to provides that the proceeding may be instituted "whenever it (the corporation) shall exercise any franchise or privilege not conferred upon it by law."

The real ground upon which the defence of *ultra vires* rests, and the only one upon which it has ever, to any extent, been judicially based, is, that the contracts of corporations which are unauthorized by their charters are to be regarded as illegal, and, therefore, void. There are three classes of illegal contracts, viz.: those which are *mala in se*, i. e., which embrace something which the law deems in and of itself criminal or immoral; 2d, those which violate the provisions of some statute, and are hence called *mala prohibita*; and, 3d, those which contravene some principle of public policy. Corporations may make contracts falling within either of the two first of these classes, and such contracts are no doubt subject to the same rules as if made by individuals. Of course, where the only objection to the contract of a corporation is that it exceeds the corporate powers, it cannot be considered as *malum in se*; and although, in this State, where we have a statute (1 R. S., 600, § 3), expressly enacting that no corporation shall exercise any corporate powers except such as their charters confer, the contrary might, with much plausibility, be contended, I shall, nevertheless, concede, for the purposes of this case, that such contracts do not belong to the class styled *mala prohibita*.

But the contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy. That contracts which do in reality contravene any principle of public policy are illegal and void, is not and cannot be denied. The doctrine is universal. There is no exception. Although the unauthorized contract may be neither *malum in se* nor *malum prohibitum*, but, on the contrary, may be for some benevolent or worthy object, as to build an almshouse or a college, or to purchase and distribute tracts or books of instruction, yet, if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwithstanding their praiseworthy nature, are

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of a C is one  
of three sorts  
1 malum in se  
2 malum prohibita  
3 vs pub pol.

2. 2. rule 211

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illegal and void. Those, therefore, who hold that corporations are liable upon their contracts, notwithstanding they were made without authority, are forced to contend that no principle of public policy is violated by such contracts. This is the ground which they do take, and which, it is obvious, they must necessarily take, in order to sustain their position. Here, then, we have an issue made up, which, if I am right, is decisive of the question under consideration.

What, then, is the argument, by which it is sought to be shown that there is no principle of public policy involved in this question of the liability of corporations for their unauthorized acts? It is said that a private corporation is simply a chartered partnership, possessing certain attributes conferred by its charter for the purpose of enabling it the more conveniently to transact its business: that, even in unincorporated partnerships, the articles of copartnership always specify the objects of the association; and that, when such associations choose to become incorporated, those objects are, for the same reason, specified in the charter: that the charter simply takes the place in this respect of the articles of agreement, in the case of an unincorporated partnership: that, as the objects of such associations, although incorporated, are of a private nature, there is no question of public policy involved; and that no public interest requires that the transactions of the corporation should be kept within its chartered limits.

If we admit the soundness of this argument, and assume that the directors of a corporation are not under any public obligation to keep within their chartered powers, but are to be regarded simply as the agents of the corporators, so that any excess of power on their part amounts simply to a breach of trust towards their principals, it would not follow that the corporation is liable upon its unauthorized contracts. But I apprehend there are serious objections to this view of the nature of corporations, and of the effect of their charters. In the first place, if there is no public interest involved, how is it possible to justify the creation of private corporations at all? Such corporations are endowed with valuable franchises and privileges, which give them great advantages over mere private citizens, whether individual or associated. The grant of such privileges upon the principles for which some of my associates contend, would be a pure piece of legislative favoritism, which should be indignantly condemned. In this country, if in no other, it is held to be the duty of government to protect the people in the enjoyment of equal rights and privileges, and not to use its power for the special benefit of its favorites. Every privilege or advantage given to one man or set of men is necessarily at the expense of others; and it is against the fundamental principles of our government that this should be done, unless required by interests of a public nature. No doubt these principles are frequently violated, and corporate powers and privileges are conferred which no public interest demands; but, nevertheless, such interest is the ostensible reason for the grant in every case.

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2

Take, for instance, the very class of corporations in question here, viz., railroad corporations, which are mere private associations, organized by their members with a view to their personal profit and emolument; and yet their creation is considered so much a matter of public interest as to invoke the power of eminent domain, by which the property necessary for their purposes is forcibly taken from its owners as for a public use. The same is true of telegraph and plankroad incorporations. But, although the interest of the public in the creation of corporations of this class is made a little more obvious by the necessity which exists of taking from others property which is specific and tangible, for the purposes of the corporation, yet the same principle applies to all corporations; for in all some value, corporeal or incorporeal, is taken from a portion of the community and given to the corporators.

Will it be said that, although the public have an interest in the creation of corporations, it has none in the precise extent of the powers conferred, and that no public policy is concerned in their being strictly confined to the exercise of such powers? It is, obviously, impossible to support such a position. The franchises and privileges given to corporations belong to the public; and it would be just as reasonable, and just as logical, to contend that, under a patent for one hundred acres of land, the patentee might take possession of two hundred without infringing any public interest. Every additional power given to, or usurped by, a corporation, extends its advantages over persons unincorporated. If a bank is permitted to trade in merchandise, it comes in competition with others so employed. If a railroad company is allowed to build and sail ships, it comes in competition with those engaged in commerce; and so of every other branch of business.

The importance of limiting corporate bodies to the exercise of those powers, and the enjoyment of those privileges and franchises, which have been specifically conferred upon them, must, I think, be obvious. They are rapidly multiplying. Their privileges give them decided advantages over mere private, unincorporated partnerships. They have large capitals and numerous agents, and are capable of entering into combinations with each other. They are not only formidable to individuals, but might even, under some circumstances, become formidable to the State. They are, or should be, created, as we have seen, for public reasons alone; and the legislature is presumed, in every instance, to have carefully considered the public interest, and to have granted just so much power, and so many peculiar privileges, as those interests are supposed to require. This reasoning is confirmed by the action of the legislature, in expressly prohibiting corporations from exercising any powers not granted to them. (1 R. S., 600, § 3, *supra*.) By making this principle of the common law the subject of an express and positive enactment, the legislature has shown that it considered this restriction upon corporations to be a matter of public interest and importance.

The fact that a mere excess of power on the part of a corporation, by the assumption of privileges not conferred, affords ground for a *quo warranto*, is in itself proof that the public has an interest in keeping such bodies within the limits of their charters. But it is said, that the proceeding by *quo warranto* is of a purely civil nature, designed solely to try a mere civil right, and that it in no manner assumes that any public right or interest has been infringed. Upon this position I take issue. In the first place, the assertion derives no support from, if it is not in direct conflict with, the legislative enactments on the subject. Not one of the provisions of the section by which the Attorney-General is authorized to institute proceedings in the nature of a *quo warranto*, contemplates injury to any private right as the ground of the proceeding. He is authorized to act in the following cases, viz.: Whenever a corporation shall "1st, Offend against any of the provisions of the act or acts creating, altering or renewing such corporation; or, 2d, Violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or, 3d, Whenever it shall have forfeited its privileges and franchises by non-user; or, 4th, Whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or, 5th, Whenever it shall exercise any franchise or privilege not conferred upon it by law." (2 R. S., 583, § 39.)

The public has an interest in it as well as in excess. Corp by its retention of remedy, known corp & c.

Not one of these subdivisions contemplates a case of injury to the private interests of stockholders. They all, without exception, relate to violations, not of individual rights, but of public law. These provisions, therefore, strongly, and, as I think, conclusively repel the idea, that a *quo warranto* is a mere civil remedy, the object of which is to redress or prevent a private injury. The proceeding is not only public and *quasi* criminal in form, but is not in its nature adapted to the enforcement of any mere private right. The rights of stockholders in corporations are abundantly protected against every unauthorized assumption of power, or any breach of trust on the part of their managing officers. If the violation of duty or breach of trust is only threatened, a court of equity will prevent it by injunction, and if committed will afford the proper redress. There is neither occasion for, nor propriety in, a resort to the proceedings by *quo warranto* for any mere private purpose, and I hazard nothing in saying that such is not the nature of that proceeding. If this conclusion is right, it inevitably follows that the assumption of any unauthorized power by a corporation is a violation of public policy and public right, and therefore illegal.

The *quo warranto* is quasi criminal not merely civil & not merely for private wrongs but for public wrongs which are for the benefit of the many.

This, then, is the true foundation of the defence we are considering. It is permitted upon the same principle and for the same reason that a private individual is permitted to plead his own illegal act, as a defence to a suit brought to enforce a contract which public policy forbids, viz.: to discourage and restrain such violations of law. There are, no doubt, cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized

Co's act violates pub policy is illegal

Analogy. Co can set up its illegal act just as private party can.

because to allow it to do so will discourage many such C's

True in some cases  
So / (estoppel)  
on C is setup  
by innocent party  
of note u.v.  
for purpose

It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers.

Such notice  
- Charles ps

The same principle is applicable to contracts not negotiable. Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed.

N.Y. R.R. Co.  
No R.R. Co. Corp.

A question analogous to this arises, where public officers who have done something in contravention of the statute under which they act, are afterwards sought to be estopped from setting up that their act was unauthorized. It was insisted by counsel in the case of *Regina v. White* (4 Ad. & El., N. S., 101), that for public reasons, officers so situated were not estopped; but Lord DENMAN said, "We have held that this is true only of a statute the contents of which are publicly known; such a statute is to have effect whatever dealings may take place; but when the persons acting, whether trustees for public purposes or not, have done any act which was not known to the parties with whom they were afterwards dealing, such an act cannot prevent the estoppel arising from that subsequent dealing." This doctrine, which was also held in the case of *Doe, ex dem. Levy v. Horne* (3 Ad. & El., N. S., 757), will be found, when carefully examined, to sustain the exception which I have suggested in the case of corporations. But, aside from these exceptional cases, it is, in my judgment, not only entirely clear upon principle, but abundantly settled by authority, that the contract of a corporation, if unauthorized by its charter, is an illegal contract, and that the corporation is not estopped from setting up this illegality in defence to an action brought upon it.

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In referring to the cases which support these views, I will notice the English cases first.

[After commenting on various cases,]

The position then occupied by some of my associates is this: They admit that the shareholders in a corporation have a right to restrain its

directors or managers, as their trustees or agents, from entering into any contract not authorized by the charter, or from carrying such contract into effect if made; and yet they hold that the directors are liable, not in their individual, but their corporate character, to the party with whom the contract is made for not carrying it into effect. It is difficult to see how these two propositions can stand together. The directors are the mere representatives of the corporators. The latter constitute the corporation. Hence, by the two propositions just stated, it is maintained, that the corporators have a legal right to enjoin their representatives against the performance of a contract, which they themselves are legally bound to perform; in other words, they are liable for damages, because their representatives have not performed a contract, which they had a right to restrain those representatives from performing. This can hardly be. It would seem to be a legal impossibility. One or the other of these propositions must, I think, be false. Either it must be denied that the shareholders can invoke the aid of a court of equity to prevent the performance of a contract entered into by the directors, which the charter does not authorize — a principle established by numerous authorities — or it must be admitted that they are not liable for the refusal or neglect of the directors to perform it. It might be otherwise if it could be shown either that persons dealing with corporations are not presumed to know the extent of the powers conferred by the charter, or that the corporators can be presumed to have authorized the directors to transcend those powers. But the contrary is the rule in respect to both.

It would seem to follow that if we look upon the unauthorized contracts of corporate officers as mere breaches of trust, and nothing more, the corporation is not bound by them. This however is not the ground upon which I have been endeavoring to maintain that corporations are exempt from liability upon their contracts which are *ultra vires*; nor is it the ground upon which such defences have in general been sustained in suits brought by third persons against corporations upon such contracts. I shall therefore proceed further to show from the authorities that such contracts are illegal and void for public reasons, entirely irrespective of the fact that they constitute breaches of trust towards the shareholders.

[The learned judge here commented on various decisions. — Ed.]

The strength of the opposing views consists in the alleged injustice of permitting a corporation to avoid obligations by pleading its own want of power to incur them. But it should be remembered, that this argument is just as applicable to the case of an individual who sets up the illegality of his own contract, and thus shields himself from responsibility upon it, as to that of a corporation. If it be said, that in the case of illegal contracts between individuals, each party is a participator in the guilt, and hence the law will not interpose to protect either; this is equally true in respect to the unauthorized contracts of corporations. Their powers are prescribed by statute, and every one who deals with

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them is presumed to know the extent of these powers. Where the circumstances are such that this presumption cannot arise, as where the want of power is not apparent upon the face of the statute, but depends upon the existence of some extrinsic fact known to the corporation, but not the party dealing with it, it has been already conceded that the corporation would be estopped from setting up that its contract was *ultra vires*.

x But the injustice which can ever accrue to individuals from permitting the defence in question, is trifling, under the law as now settled, compared with the importance to the public of keeping corporations within their chartered limits. It has been repeatedly held by this court, that where corporations, by means of contracts or engagements prohibited by law, *i. e.*, which are unauthorized by their charters, have obtained from other persons any money or other thing of value, while the contract itself is void and can never be enforced, the corporation may nevertheless be compelled, in a suit brought in disaffirmance of the contract and founded upon the equities of the case, to restore what it has obtained. This rule removes from corporations all temptation to engage in illegal transactions; and while it tends thus to promote the public policy of the State, it at the same time protects individuals from any gross injustice.

My conclusion, therefore, is, that the contract of the defendants to transport the plaintiffs from Chicago to Toledo was illegal and void, they having, as we have seen, no power under their charters to enter into the engagement for running their cars on joint account between those two places. It does not follow, however, that they are not liable to the plaintiff in this action. The complaint is founded upon the duty which rested upon the defendants, growing out of the relation in which they stood to the plaintiff, to take care that he should not be injured by their negligence. If this duty could only arise out of some contract between the parties, then the conclusion arrived at would be fatal to the recovery. The contract actually made by the defendants to transport the plaintiff can form no part of the plaintiff's case, and he must recover, if at all, irrespective of that contract.

It is said that if the contract was *ultra vires* and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted while attempting to perform it. But this, I apprehend, by no means follows, though it is probably true so far as the duty to observe due care grew out of the contract. The plaintiff's claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or who has been run over by a train of cars, when crossing the railroad track. The duty to observe care in these cases arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, on

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to conduct as not through their negligence to inflict injury upon others.

It is unnecessary to cite authorities to show that corporations are liable for the culpable negligence of their servants or agents while engaged in the business of the corporation, in the same manner as individuals are liable for the negligence of themselves or their servants. It will scarcely be doubted that if the defendants' cars, through the carelessness of their employees, had run over the plaintiff, while passing upon a highway across the track of any portion of the road used by them, the corporation would have been liable. They could not set up that having no power to run their cars beyond the limits prescribed by their respective charters, all acts outside of those limits must be regarded as the acts of the individuals performing them, and not of the corporation. We have already seen that corporations may exceed their powers and may perform unauthorized acts, and incur responsibilities thereby. There is no doubt that all that was done under the arrangement between the defendants, found by the referee, unauthorized and contrary to law, is nevertheless to be treated as done by the corporations themselves. The business was carried on under the direction of their managing officers, with their property and for their benefit, and they cannot now be heard to deny that it was done by them. It follows that at least in respect to all persons with whom they had no conventional relations, their responsibilities would be precisely the same as if the business in which they were engaged was lawful.

To test the liability of the defendants, therefore, in this case, it is necessary to inquire what would be the responsibility of railroad companies in general towards persons sitting in their cars, but whom they have made no contract to transport. This must depend upon the circumstances under which the individuals had entered the cars. If they were there as mere trespassers, without shadow of right, the company would not, perhaps, be responsible for any injury they might sustain, through the negligence of its servants. But if, on the other hand, the entry into and remaining in the cars, was with the assent, express or implied, of the company, and injury should result from the negligence of the latter or its agents, the company would, I think, be responsible. It was held by this court in the case of *Nolton v. The Western Railroad Corporation* (15 N. Y., 444), that when a railroad company voluntarily undertakes to carry a passenger upon their road, although without compensation, if such passenger is injured by the culpable negligence of the agents of the company, the latter is liable, in the absence of any express agreement exempting it. The principle of that case is applicable to this. Although here, if we lay aside the contract, there was no undertaking to transport the plaintiff, either with or without compensation; yet this can make no difference, as the liability in such cases arises, not from any contract express or implied, but from the universal obligation of all persons to avoid injury to others through their negligence.

*If was no trespasser but a licensee*

Suppose, while standing upon your own premises, you accidentally, but through sheer carelessness, discharge a gun and wound a person walking upon the highway, you are clearly liable for the injury. If the person injured, instead of being upon the highway, were in your own house with your assent, would not your liability be the same? No one can doubt it. Suppose, then, instead of being in a house with the owner's assent, the individual is in the car of a railroad company with the consent of the company, would he not have the same right to immunity from injury through the negligence of the company or its agents? This is self-evident. The company might not be liable in such a case for the careless discharge of a gun by one of its servants, because using the gun would be no part of the servant's duty to his employers. But if, through the carelessness of the engineer, the boiler of the engine should burst, and injury should ensue, the liability of the company would be clear. So, if the injury arose from a collision, running off the track, or any such cause.

It will be seen, therefore, that the question of responsibility for injuries sustained from negligence, when the person injured is within the domain or upon the premises of the party guilty of the negligence, turns upon the inquiry whether he is there lawfully or as a trespasser. It is true that when the negligence occurs in the course of the performance of some gratuitous service by the party guilty of the negligence, for the party injured, the former is only liable for gross negligence; but no question on this subject arises in the present case, as the proof in that respect will be presumed to have been such as to support the judgment, since nothing appears to the contrary.

Was the plaintiff, then, in the defendants' cars as a mere trespasser, or was he there lawfully, as between him and the defendants. To this question there can be but one answer. The defendants can never allege that the plaintiff was in their cars as a trespasser, when he was there by their express assent. The contract between him and the company, it is true, for reasons of policy could not be enforced. The defendants might at any time have repudiated it, and required the plaintiff to leave the cars; and if he refused might thereafter have treated him as a trespasser. But neither his entry into the cars, nor his remaining there until required to leave, could ever be regarded by the defendants as an infringement upon their legal rights.

It may be said that the plaintiff by consenting to travel in the defendants' cars became a participator in their unlawful conduct, and hence is not entitled to recover; but for this position there is not a shadow of authority. The law offended against by entering into the illegal contract in this case, is a law of restriction upon the defendants and not upon the plaintiff. The implied prohibitions which were violated rested solely upon them. There was no law prohibiting the plaintiff from traveling in their cars. I have already adverted to the rule that where the illegality of the contract consists in the violation of some law, the prohibitions of which are aimed at one of the parties only, the

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*1878. If such a case had been brought before the Court. The Supreme Court held that  
"because in this case it is a question of one object, the incorporation of the act as an innkeeper, or  
it and cannot form a basis of liability therefor." This says, it "cannot be maintained  
that engaged in that occupation, assumed liability, an innkeeper towards passengers,  
+ not a hotel, conduct for such cases, it cannot now repudiate its liability upon the fact  
that it was a hotel."*

other party is to be treated as comparatively innocent, and may have relief against the more guilty party even in an action *ex contractu*. If, then, he is entitled to enforce a mere equity against the other party *a fortiori* may he claim redress for injuries consequent upon their *tortious* acts. He is so far regarded as *particeps criminis*, that he forfeits the whole benefit of his contract. He could not recover for any failure of the company to transport him in due time or to transport him at all, whatever damages he might thereby sustain; but he cannot be said, like an outlawed felon, to have *caput-lupinum* and thus to be liable to be knocked on the head like a wolf or to have his limbs broken with impunity. (4 Bl. Com. 320.) Upon these grounds I think the recovery was right, and that the judgment should be affirmed.

CLERKE, J., delivered an opinion for affirmance on the ground last stated by SELDEN, J. DENIO, J., was for reversal; all the other judges were for affirmance, but without passing upon the questions discussed by COMSTOCK, Ch. J., and SELDEN, J.

*Judgment affirmed.*

48/678.

79 BATH GAS LIGHT CO. v. CLAFFY. Contd.

1896. 151 *New York*, 24.1

THE plaintiff is a Maine corporation, created under a special law of that state, passed in 1853, for the purpose of supplying gas for the lighting of the streets and buildings in the city of Bath. The United Gas, Fuel and Light Company is a Maine corporation, organized in 1888, under a general law of that state.

On November 10, 1888, the plaintiff company executed to the United, &c., Company a lease of its property and franchises for the term of twenty-five years from November 1, 1888, at an annual rent of \$2500, which the lessee covenanted to pay in semi-annual payments on the first day of May and the first day of November in each year, and also the taxes assessed during the term. Provision was made for the payment by the lessor to the lessee, at the expiration of the term, of the value of any improvements or extensions made by the lessee, and it was also provided that the lessee should give to the lessor a satisfactory bond for the faithful performance by the lessee of its covenants in the lease. In pursuance of the provision last mentioned, the United Gas, Fuel and Light Company, on the same day, executed a bond with the defendants John Claffy and John T. Rowland as sureties, conditioned for the faithful performance by the company of the covenants in its behalf contained in the lease, which bond was delivered to and accepted by the plaintiff. The sureties were interested in the

*leased to prop franchise to United Co & Claffy went suit for United Co for perf. & prop lease. The United Co occupy prop defaulted as result.*

<sup>1</sup> Statement abridged. Arguments omitted. — ED.

United Gas, Fuel and Light Company as stockholders, and Claffy (the appellant) was also a director. The lessee immediately, upon the execution of the lease, entered into possession of the demised property and paid the rent up to the 1st day of November, 1889, but defaulted in the semi-annual payment due May 1st, 1890, and on the 2d day of August, 1890 (the rent remaining unpaid), the plaintiff re-entered and took possession of the demised property under a provision of the lease which authorized the lessor to enter and expel the lessee on failing to pay rent. The entry also was, as may be inferred, with the consent and, indeed, at the suggestion of the officers of the lessee. This action was brought on the bond against the lessee and the sureties to recover as damages the rent which fell due May 1, 1890, and the proportionate rent from that date up to August 2d, 1890, and taxes which had been assessed against the property during its occupation by the lessee, which it had failed to pay.

The defendant Claffy alone appeared and defended the action. His sole defence to the general claim is that the lease was *ultra vires*, illegal and void, because (as is conceded) it was made without legislative sanction.

The court below gave judgment in favor of the plaintiff. Claffy appealed.

*Abram J. Rose, L. Laflin Kellogg, and Alfred C. Petté*, for appellant.  
*James McKeen*, for respondent.

ANDREWS, C. J.

There are some propositions pertaining to the general subject which are beyond dispute. One is, that a contract by a corporation to do an immoral thing, or for any immoral purpose, or, to use a convenient expression, a contract *malum in se*, is void and gives no right of action. The doctrine, however, is not peculiar to contracts of corporations. It has its root in the universal principle that persons shall not stipulate for iniquity. Another principle of general recognition is that a corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statute, and in the application of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act which the legislature within its constitutional power has declared shall not be performed. The series of cases in this state, known as the Utica insurance cases, afford an apt illustration. It was held that the restraining acts which prohibited the exercise of banking powers, including the discount of paper, by other than banking corporations, rendered void securities taken on such discount by corporations not possessing banking powers, and this, although the object of the restraining laws seems to have been the protection of the chartered banks in the monopoly of banking.

Sureties were  
directors of the  
- United Co

Of the sureties  
on their bond

Claffy sets up  
lease was ultra vires  
as no legislative sanction

C's mal in se  
gives no right of action

C's expressly prohibited  
gives no right of action

But in not infrequent instances corporations enter into unauthorized contracts, which are neither *mala in se* nor *mala prohibita*, or when the only prohibition or restriction is implied from the grant of specified powers. It is this class of cases which open the field of controversy. Is such a contract performed by one party, but not performed by the other, void as between them to all intents and purposes, so that no recovery can be had under it against the party who has received the consideration for his promise, but neglects or refuses to perform it, or is it so tainted with illegality that the courts must refuse to recognize it under any circumstances or enforce its obligation, whether as to past or future transactions? There are certain English cases which are relied upon by those who maintain the strict view that contracts of corporations *ultra vires* are under no circumstances enforceable in the courts.

Plus une autre  
an

It is important to observe that in each of these cases the action was brought against the offending corporation, or those in privity with it, to enforce the unauthorized contract while it was still executory on the part of the corporation, and that the effect of a recovery would have been to divert and appropriate the funds of the corporation by the action of the courts, to unauthorized objects, to the prejudice of the legal rights of stockholders and creditors. Without questioning these cases, it is quite apparent that they stand in justice upon a very different basis from the action in this case, which is brought by the corporation to enforce a contract, the enforcement of which will indemnify the plaintiff and its stockholders for the deprivation of the use of the property of the corporation, during its possession by the defendants, under the unauthorized lease. The Supreme Court of the United States seems to be committed to a construction of the doctrine of *ultra vires* which would sustain the defence in the case now before us. Several cases have arisen in that court upon leases of railroads made without legislative sanction, in which it has been held that such leases are void as between the parties, and that no action can be maintained thereon to recover the rent reserved, even during the occupation by the lessee under the lease.

Auth. vs. lease  
are ex. or recovery  
by act. et. c.  
on Corp. & lease

This will be a  
fr. sh. h.

Ca. in 2d Cl  
as to Ry. leases  
contra

We concede that a railroad or other corporation invested with powers in the exercise of which the public have an interest, and empowered by reason of its *quasi* public character to do acts and exercise privileges peculiar and exceptional to enable it to discharge its public duties, cannot, as against the public, abdicate its functions or absolve itself from the performance of such duties through an unauthorized transfer of its property and franchises to another body or corporation. We have so held in the case of *Abbott v. The Johnstown, etc., Railroad Co.* (80 N. Y. 27), where it was decided that a railroad corporation which, without legal sanction, had leased its road, was not

destiny as  
ca. & publ  
serv. Co. & priv  
corps & lease  
corp on NYC  
upheld

thereby exempted from liability as carrier to a passenger injured by negligence during the operation of the road under the lease.

There are obvious reasons of propriety and public policy, the prevention of monopolies, among others, aside from the mere question of capacity under their charters, which enforce the now well-settled doctrine, that leases by such *quasi* public corporations, to be valid and effectual, must be authorized by statute. But where, as in the present case, such an unauthorized lease has been made, and the lessee has received and enjoyed the possession of the property under the lease, is there any public policy which requires that the lessee should be permitted to escape the obligation imposed by the contract to pay the rent reserved during the enjoyment of the property? It is doubtless true, as has been suggested, that the corporation in such cases cannot,

without the consent of the state, change its obligations to the state or the public, and discharge itself from its public duties. But the law affords ample remedy for the usurpation by corporations of unauthorized powers, through proceedings by injunction or for the forfeiture of their charters. If a lease by a corporation, made in excess of its powers and without legislative sanction, is illegal in the ordinary and proper sense of the term, it may be properly conceded that no action could be maintained upon it. The lessee, when sued for the rent, could set up the illegality of the contract, and the defence would prevail, however inequitable the defence might be. But the term "illegal," which is frequently used to describe a contract made by a corporation in excess of its corporate powers, in most cases means simply that the contract is unauthorized, or one which the corporation had no legal capacity to make. Such a contract may be illegal in the true and proper sense, but it may also be one involving no moral turpitude and offending against no express statute. The inexact and misleading use of the word "illegal," as applied to contracts of corporations, *ultra vires* only, has been frequently alluded to. (COMSTOCK, C. J., *Bissell v. M. S. Railroad Co.*, 22 N. Y. 268; ARCHIBALD, J., *Riche v. Ashbury Railway Carriage Co.*, L. R. [9 Exch.] 293; LORD CAIRNS, *S. C.* on appeal, L. R. [7 Eng. & Ir. App.] 672.)

The lease now in question was not in any true sense of the word illegal. It was undoubtedly void as against the state. The parties to the lease assumed it to be valid. It was contemplated, as the provisions of the lease show, that the lessee would continue and extend the business before carried on by the plaintiff, and it is not suggested that it did not, during its occupation, discharge all the obligations to the public which rested upon the plaintiff. The state has not intervened, and the possession of the property has now been restored to its original proprietors. The contract has been terminated as to the future, and all that remains undone is the payment by the lessee of the unpaid rent. We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as be-

\* "Whether a loan of its property to one who is not one of its members or shareholders is an unauthorized exercise of its corporate powers which cannot be raised collaterally by individuals but can be presented for determination only in a direct action, is the question before the court. The appellant is not entitled to make such a defence to its claim. If there is any doubt as to the validity of this note and mortgage upon a sufficient contract, the plaintiff is entitled to set up as a defence to an action thereon the fact that the defendant's note and mortgage was *ultra vires* of the corporation." *Claffy v. Bath Gas Light Co.*, 22/6/20; 67/6/24; 12/1/67

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Gu. C w/ (an evas<sup>n</sup> of C were bad.

*Judgment affirmed.*

0104/326 \ 136/525:acc. - 221/2027.

1885. 9 *Colorado*, 11.<sup>1</sup>

of ins of  
re hail. 24  
for 300 prem  
in cash & note  
\$5800 - n. p. on d.

Defendants' answer set up, as second defence, that the defendant company's articles of incorporation were duly recorded in two public

<sup>1</sup> Statement abridged. Portions of opinions omitted. — Ed.



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of sh have  
known

offices long before the issuing of said policy; that under said articles the company has no authority to insure growing crops against damage by hail; and is authorized to insure property only against damage by fire or lightning.

The plaintiff demurred to this second defence. The demurrer was sustained. After assessment of damages, judgment was rendered for plaintiff, and the Insurance Company appealed.

*Stallcup, Luthe & Shaffroth*, and *Teller & Orahood*, for appellant.

*Norville & Clark*, and *T. M. Robinson*, for appellee.

STONE, J.

of has fully  
paid all exacts  
of him by of

In the case before us the contract, as made by the parties, appears to have been fully executed on the part of the appellee, so far as his right of action when brought was affected by it. He had paid a small portion of money on the amount of the premium agreed to be paid and had given a promissory note for the balance. This was all he had agreed to do; all that had been exacted of him by the insurance company, and this he had performed. It matters not that the note had not been paid, for it was not due when his right of action accrued and when he brought his suit.

The sole defense upon which the appellant company relies here is its want of authority to insure against hail. By offering to insure the property of appellee against damage by hail, and by entering into the contract of insurance therefor, it claimed to possess the power so to do. It took the appellee's money and assumed the risk and obligation of paying the damage, much or little, that might occur, or of having nothing at all to pay, if the contingency of damage should not happen within the time covered by the policy.

A loss having occurred, the company seeks exemption from the obligation it entered into by denying that it had any authority to do what it asserted the right to do when it voluntarily assumed the undertaking.

of is estoppel  
show invalid  
- r b.

We are aware that the courts have been very slow to concede that a defendant setting up as a defense the *ultra vires* of a contract, where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts would avoid this seeming inconsistency by resting the recovery upon some other ground they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show the invalidity of the contract. In such case, the contract is assumed by the court to be valid, the party seeking to avoid it not being permitted to attack its character in this respect.

The point was strongly insisted upon by counsel for appellant in

All parties must at their peril ascertain the laws.

All parties must at their peril ascertain contents, recorded instruments.

argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business, and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract.

dispute doctrine of notice

While as a general proposition this is true, yet it must be conceded that this constructive notice is of a very vague and shadowy character. Every one may have access to the statutes of the states affecting companies incorporated thereunder, and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous. It was in answer to the same point that Chief Justice Comstock observed, in his opinion in a leading case upon this question, that "a traveler from New York to Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations." *Bissell v. M. S. & N. I. R. R. Co.* 22 N. Y. 258.

is a vague thing  
that is constructive

The principle of estoppel by conduct is the same principle which is applied by courts in holding that the statute of frauds, by which, under the general rule, a contract would be void, is never to be used for the protection of a fraud.

We do not say that the directors or acting officers of such company may act in excess of their legitimate powers against the interests and contrary to the will of the stockholders of such company, but while admitting the excess of proper authority, we think, on principle and the weight of modern decisions, that if the stockholders, whose business it is to see that their own managing officers act within the proper scope of their powers, either expressly, or by silence impliedly, assent to acts done on their behalf in excess of authority, they should be held estopped to deny that such acts were authorized.

Shall are barred  
by acquiescence.

The appellant company here offered to pay back the money and return or cancel the note given for the policy, and counsel urgently contended that this is all that legally can or rightfully ought to be exacted. This would not place the appellee in *statu quo*. Every insurance company would be ready and willing to do that much after the loss had occurred, on condition of exemption from payment of the loss. The damage to appellee is the loss of his crops against which the appellant undertook to secure him. After the loss it was too late for appellee to insure in another company having unquestioned authority to insure against such loss.

Refused to put off in statu quo.  
He could have used in the Co

We therefore conclude that since the contract of insurance, though it may have been beyond the scope of the proper object and purposes of the company as expressed and conferred by their articles of incorporation

and Co. 231, 873 Eastern Columbia Ry Co. v. Hawkes & St. Remond, and that the doctrine was "to relieve doctrine, it is to clear cases, express or implied knowledge of other party, express or implied, or nature, or corporate affairs, or dealings with.

tion, was neither by statute nor by their charter expressly forbidden, nor in its nature illegal or improper, and since the conduct of the company in soliciting the insurance and entering into the contract therefor under the circumstances disclosed by this case was such that to exempt it from its engagements thereunder would result in injuring and defrauding the appellee, who in good faith dealt with the company under the belief of its rightful authority in the premises, the defense of the appellant company interposed against its liability on the contract is inequitable, unconscionable, and should not be allowed.

The judgment of the court below is affirmed.

*Affirmed.*

BECK, C. J., and HELM, J., concurring. Private corporations are creatures of statute, and derive their powers solely therefrom. Upon weighty considerations of public policy, and of private equity as well, the principle has been universally recognized that the charters or general laws through which these corporations derive their existence absolutely control their action; that a contract made or an act done by them which is not in any manner authorized by some express provision of the charter or law of incorporation, or which may not be clearly implied therefrom, is *ultra vires*; and that such usurpation of power may be relied upon as a complete defense to a suit growing out of the unauthorized act or contract.

But, for the purpose of avoiding the infliction of manifest injustice in given cases, many courts of the highest respectability have seen fit to recognize an exception to the foregoing doctrine. This exception, when admitted, is always based upon principles largely analogous to those supporting equitable estoppels. The decisions recognizing it hold that where a corporation receives and retains the full benefit of a contract, and a failure to perform on its side would result in palpable injustice to the other contracting party, it is estopped from escaping liability thereunder through a plea of *ultra vires*.

We are inclined to the opinion that cases sometimes arise wherein this exception, properly understood and limited, should be held applicable. If a private corporation has accepted and retained the full benefits of a contract which it had no power to make, the same having been performed by the other party thereto; and if the transaction is of such a nature that the party thus performing will suffer manifest injustice and hardship unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, we think the defense of *ultra vires* may be disallowed. This, however, does not do away with the objectionable character of the unauthorized contract. It admits the legal wrong committed by the usurpation of power, but denies the equitable right of the corporation to profit through such wrong at the expense of parties contracting with it; the corporation, having received and retained the benefit of the contract, is denied the

privilege of invoking the illegality of its act, and thus avoiding consequences naturally flowing therefrom.

The circumstances attending and surrounding the transaction now before us, in our judgment, render this an appropriate case for the application of the foregoing equitable doctrine. For this reason we concur in the conclusion arrived at by Mr. Justice Stone, who writes the principal opinion.

*Affirmed.*

6 NATIONAL BANK v. MATTHEWS.

1878. 98 United States, 621.

107-108. Massachusetts v.  
1007-

ERROR to the Supreme Court of the State of Missouri.

On the 1st of March, 1871, Hugh B. Logan and Elizabeth A. Matthews executed and delivered to Sterling Price & Co. their joint and several promissory note for the sum of \$15,000, payable to the order of that firm two years from date, with interest at the rate of ten per cent per annum. The payment of the note was secured by a deed of trust, executed by her, of certain real estate therein described, situate in the State of Missouri.

of \$15,000 note & deed  
to S Price & Co. who  
gave it as security  
on a loan  
of \$15,000. The  
note & deed  
secured by mtg  
on R.E.

On the 13th of the same month, the note and deed of trust were assigned to the Union National Bank of St. Louis. Price & Co. failed to pay the loan at maturity. The bank directed the trustee named in the deed of trust to sell. Said Elizabeth thereupon filed this bill in the proper state court to enjoin the sale. The bank in its answer avers that it "accepted the said note and deed of trust as security for the sum of \$15,000, then and there advanced and loaned to said Sterling Price & Co. . . . on the security of said note and deed of trust." A perpetual injunction was decreed, upon the ground that the loan by the bank to Price & Co. was made upon real-estate security; that it was forbidden by law; and that the deed of trust was, therefore, void. The decree was made upon the pleadings. No testimony was introduced upon either side. The bank removed the case to the Supreme Court of the State, where the decree was affirmed. The bank then sued out this writ of error.

MR. JUSTICE SWAYNE, after stating the facts, delivered the opinion of the court.

This case involves a question arising under the national banking law, which has not heretofore been passed upon by this court. We have considered it with the care due to its importance.

Our attention has been called to but a single point which requires consideration, and that is, whether the deed of trust can be enforced for the benefit of the bank.

The statutory provisions which bear upon the subject are as follows:—

“SECT. 5136.” Every national banking association is authorized “to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

“SECT. 5137. A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: *First*, such as may be necessary for its immediate accommodation in the transaction of its business. *Second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. *Third*, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. *Fourth*, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.” Rev. Stat. 1999; 13 Stat. 99.

Here the bank never had any title, legal or equitable, to the real estate in question. It may acquire a title by purchasing at a sale under the deed of trust; but that has not yet occurred, and never may.

Sect. 5137 has, therefore, no direct application to the case. It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose it may be laid out of view.

Sect. 5136 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat*, that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage would have been, was an incident to the note, and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter.

The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real-estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect

U.S. v. H. & L. Co.  
- RE  
Contract to imp.  
of S.

Loan on RE prohibited  
But this was on  
a note as well

Reasons prohibited

a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defence of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error.

In *The First National Bank of Fort Dodge v. Haire and Others* (36 Iowa, 443), the bank refused to discount a note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should indorse it, that the bank should discount it, and that the maker should indemnify the indorser by a bond and mortgage upon sufficient real estate executed for that purpose, with a stipulation that, in default of due payment of the note, the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and indorser failed and became bankrupts. The bank filed a bill to foreclose. The same defence was set up as here. In disposing of this point, the Supreme Court of the State said: "Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors; and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this. *Silver Lake Bank v. North*, 4 J. C. R. 370."

But it is alleged by the learned counsel for the defendant in error that in the jurisprudence of Missouri a deed of trust is the same thing in effect as a direct mortgage, — with respect to a party entitled to the benefit of the security, — and authorities are cited in support of the proposition. The opinion of the Supreme Court of Missouri assumes that the loan was made upon real-estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

In *Harris v. Runnels* (12 How. 79), this court said that "the statute must be examined as a whole, to find out whether or not the makers meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice." In that case, a note given for the purchase money of slaves, taken into Mississippi contrary to a statute of the State, was held to be valid.

*This act is not  
reason or rule  
so much as  
require avoidance  
of security*

*But even if prob<sup>ly</sup>  
does it follow  
that it is void  
not necessarily  
Cong has not  
said it will be  
i.e. if U.S. still  
what is effect  
Does it make  
void?*

Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. *Milford v. Worcester*, 7 Mass. 48; *Parton v. Hervey*, 1 Gray (Mass.), 119; *King v. Birmingham*, 8 Barn. & Cress. 29.

In analogous cases prohibited acts were held not wholly void

Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void. *The Planters' Bank v. Sharp et al.*, 12 Miss. 75; *The Grand Gulf Bank v. Archer et al.*, 16 Id. 151; *Rock River Bank v. Sherwood*, 10 Wis. 230.

The charter of a savings institution required that its funds should be "invested in, or loaned on, public stocks or private mortgages," etc. A loan was made and a note taken, secured by a pledge of worthless bank-stock. The borrower sought to enjoin the collection of the note upon the ground that the transaction was forbidden by the charter, and therefore void. The court held the borrower bound, and upon a counter-claim adjudged that he should pay the amount of the loan with interest. *Mott v. The United States Trust Co.*, 19 Barb. (N. Y.) 568.

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Runyon v. Coster*, 14 Pet. 122; *The Banks v. Poitiaux*, 3 Rand. (Va.) 136; *McIndoe v. The City of St. Louis*, 10 Mo. 577. See also *Gold Mining Company v. National Bank*, 96 U. S. 640.

The authority first cited is elaborate and exhaustive upon the subject. So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found.\* *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 604.

In *Silver Lake Bank v. North* (4 Johns. (N. Y.) Ch. 370), the bank was a Pennsylvania corporation, and had taken a mortgage upon real estate in New York. A bill of foreclosure was filed in the latter State. The answer set up as a defence "that by the act of incorporation the plaintiffs were not authorized to take a mortgage except to secure a debt previously contracted in the course of its dealings; and here the money was lent after the bond and mortgage were executed." The analogy of this defence to the one we are considering is too obvious to need remark. Both present exactly the same question. Chancellor Kent said: "Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter, than for this court in

Inquest of office - an inquiry by a King's officer, coroner or escheator whether a person or community or virtute official into a matter in which King is interested; e.g. escheat of lands on attainder. The verdict is called office found

this collateral way to decide a question of misuser, by setting aside a just and *bona fide* contract." . . . "If the loan and mortgage were concurrent acts, and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. A mortgage taken to secure a loan advanced *bona fide* as a loan, in the course and according to the usage of banking operations, is not surely within the prohibition."

*Dep if not  
w/ reason  
of rule*

It is not denied that the loan here in question was within this category. This authority, if recognized as sound, is conclusive. See also *Baird v. The Bank of Washington*, 11 Serg. & R. (Pa.) 411.

Sedgwick (Stat. and Const. Constr. 73) says: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

What is said in the text is fully sustained by the authorities cited.

We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defence whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress.

That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government.

The decree of the Supreme Court of Missouri will be reversed, and the cause remanded with directions to dismiss the bill; and it is

*So ordered.*

MR. JUSTICE MILLER dissenting.

I am of opinion that the National Banking Act makes void every mortgage or other conveyance of land as a security for money loaned by the bank at the time of the transaction to whomsoever the conveyance may be made; that the bank is forbidden to accept such security, and it is void in its hands.

The contract to pay the money, and the collateral conveyance for security, are separable contracts, and so far independent that one may stand and the other fall.

In the present case, the money was loaned on the faith of the deed of trust, and that instrument is void in the hands of the bank, but the note, as evidence of the loan of money, is valid against Mrs. Matthews



personally. With this latter contract the state court did not interfere. It enjoined proceedings under the deed of trust against the land, and did no more.

Its judgment in that matter ought, in my opinion, to be affirmed.

BY MARBLE CO. v. HARVEY.

1892. 92 Tennessee, 116.<sup>1</sup>

APPEAL from Chancery Court of Knox County. H. R. GIBSON, Ch. *Green & Shields* for Marble Company.

*W. C. Kain* for Harvey.

LURTON, J. The complainant is an Ohio corporation, and was organized under the general incorporation law of that State "for the purpose of cutting, dressing, manufacturing, selling, and disposing of marble, stone, slate, granite, and other substances, with such other incidental and necessary powers essential to carry on said business." This company, with its place of business in Cincinnati, Ohio, has acquired the entire issue of shares made by a Tennessee incorporation, engaged in a similar business and under a similar charter, and known as the "McMillin Marble Company." Its last acquisition of shares was under a contract with the defendant, who was president of the Tennessee company, and who owned, at the time of the sale, twenty-five shares, being one half of the entire stock of the company. These shares he conveyed to a trustee, selected by the purchasing corporation, for its use and benefit. The consideration for the sale was the payment of six thousand dollars, the defendant assuming and agreeing to personally pay off and discharge one half of all liability which might be fixed upon the McMillin Marble Company as a result of certain suits against that company then pending in the Courts of this State.

The bill alleges, and the evidence establishes, that the complainant company has been compelled, in order to protect the property of the McMillin Marble Company, to pay out about the sum of three thousand dollars in settlement and satisfaction of the claims in suit at time of its contract with defendant.

The relief sought is a decree against defendant for one-half this sum, being the proportion he agreed to pay under his agreement of sale.

The defense is that the contract of sale to the complainant company was unlawful and void; that is to say, that the purchase of these shares was outside the objects of its creation as defined in its charter, and is therefore such a contract as is not only voidable, but wholly void and of no legal effect; that it is not a case of excessive use of a power granted, but that no power whatever was conferred to deal in or

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hold the shares of another corporation; that the suit is one upon a void contract and in furtherance of it, and that it should not be entertained by a Court of law or equity.

[After discussing the question of *ultra vires* the opinion proceeds as follows:]

The result is, that this purchase of shares for the express object of controlling and managing another corporation was *ultra vires*, and, therefore, unlawful and void. Being void, it was of no legal effect, and no rights result from it enforceable by or through the Courts of the State, when such aid is invoked in furtherance of the unlawful agreement.

But it has been insisted very earnestly by the able and learned counsel for complainant, that where the contract has been fully executed by the plaintiff, the defendant should not be permitted to invoke such defense to a suit brought to compel performance; that to permit such a defense would work injustice, and enable defendant to repudiate his liability while holding on to the price he has received. There are cases where, the contract being fully executed on both sides, the Court, in the interest of justice, has refused to aid either in obtaining a rescission. *Whitney Arms Co. v. Barlow*, 63 N. Y., 62, is one of this class.

So there are cases where the defense of *ultra vires* has not been entertained when the defect was in the *mode* of executing the contract or in the *power of the agent*.

So there are many cases holding the party relying upon the defense of *ultra vires* to an accountability for the benefits received. Green's *Brice's Ultra Vires*, 717, and note at end of chapter.

Again, there are cases where the Courts have refused to entertain suits to recover property from corporations which is held in excess of charter capacity. In such cases the Courts have held that the defect in power could not be set up in a collateral way, and that the State only could complain of such violation. To this effect were our own cases of *Barrow v. Turnpike Co.*, 9 Hum., 303, and *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668.

The question here is not like any of these. The complainant sues upon its contract, and, in affirmance of it, seeks to have the defendant perform an agreement which sprang from, and was collateral to it. It has received the shares it purchased, and holds on to them. It simply asks that the defendant be further compelled to perform his contract by contributing, in accordance with his agreement, his proportion of the liability paid off by complainant in protection of the property of the McMillin Marble Company. The suit is clearly in furtherance of the original, unlawful, and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it.

This proposition was very plainly put in *Pittsburg, etc., v. R. & H. Bridge Co.*, where it was stated, as a result of all the previous de-

Arg. P. f

2 Distinguishes  
1 nullify C

2 U.V. only as to  
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3, 4 C record

4 convey C

Suit in furtherance  
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cisions of that Court upon this subject, "that a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into effect, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received." 131 U. S., 389.

The case of *Central Transportation Co. v. Pullman Car Co.* [139 U. S. 24] is an exceedingly interesting case, as it involved a consideration of the circumstances under which a defendant may interpose the defense of *ultra vires*, notwithstanding full performance by the plaintiff.

In that case, the Central Transportation Company had leased and transferred all of its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of \$264,000 for a term of ninety-nine years. Possession was taken, and the installments paid for a number of years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained, the Court holding that the sale was unauthorized and in excess of the power of the selling company. It was urged for the plaintiff, as in this case, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period.

After reviewing its own decisions upon this branch of the case, that Court said:

"The view which this Court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been com-

plied with. But where the contract is beyond the powers conferred upon it by existing law, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by law.

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." 139 U. S., 60.\*

This seems to us to fully and clearly state the rule. The passage cited by counsel from *Railway Co. v. McCarthy*, 96 U. S., 267, "that the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice, or work a legal wrong," is misleading; and, if literally construed, would result in an enormous practical extension of the powers of corporations.

We do not understand that a result required by adherence to the law would be either unjust or a legal wrong. The learned Judge doubtless intended it to be understood that the defense would be a legal wrong only when the law did not require its consideration by the Court.

This passage and one of similar character in *San Antonio v. Mehaffy*, 96 U. S., 312, was uncalled for in the case in which it was used, and in *Central Transportation Co. v. Pullman Car Co.*, *supra*, was characterized as "a mere passing remark."

To sustain this suit, as now presented, would be in affirmance and furtherance of an unlawful and void contract. It is in no sense a suit in disaffirmance.

Whether complainant could tender back the shares received, and maintain a suit to recover the money paid for the shares upon an implied agreement to return money which the defendant had no right to retain, is a question not presented upon this record.

The decree dismissing the bill must, upon the grounds herein stated, be, and accordingly is, affirmed.

\* cf. *Northwestern Union Packet Co. v. Shaw*, 37 Mo. 655. 40 n. 3.

The rule may fairly be deduced from the cases "that where money has been paid upon an agreement which is free from moral turpitude, is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto, otherwise capable of contracting, to enter into that particular agreement, or for want of compliance with some formal requirement of law (as that it shall be in writing, and the like) the money so paid may while the agreement remains executory be recovered back to the party who paid it."

Rule

Does not pass on qu. mer.

NASSAU BANK v. JONES ET AL. Ex'rs. <sup>compt'</sup>

1884. 95 New York, 115.<sup>1</sup>

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 9, 1883, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 17 J. & S. 498.)

This action was brought against defendants as executors of the will of Daniel Jones to compel them to transfer and deliver to plaintiff fifty \$1,000 bonds and one hundred and twenty-five shares of the stock of the Denver and Rio Grande Railroad Company, or to account for and pay over the value thereof and all interest and dividends received by their testator thereon.

The material facts are stated in the opinion.

*Samuel Hand*, for appellant.

*Martin J. Keogh*, for respondent.

RUGER, Ch. J. The question involved in this case, as we regard it, is the right of a banking corporation chartered under the laws of this state to subscribe for the stock of a railroad corporation.

In the spring of 1879, the Denver and Rio Grande Railroad Company, being a corporation organized to construct railroads in Colorado and adjoining territories, with the view of raising money to extend its lines, published a circular, whereby it proposed in substance, to issue \$5,000,000, of its bonds, in sums of \$1,000 each, payable thirty years after date, with annual interest at seven per cent in gold, secured by mortgage upon its property; and to deliver one of such bonds together with five shares of its capital stock, of the par value of \$100, per share, to each and every person who should advance thereon the sum of \$900, reserving, however, the privilege to the railroad company, of withdrawing the proposition, when it should have received subscriptions to said loan, to the amount of \$3,000,000. This proposal was favorably received, and the loan was subscribed for by citizens and corporations in various States of the union, to an amount greatly exceeding the sum

<sup>1</sup> Arguments and part of opinion omitted. — ED

*In. Can. rry  
Ry Co. authority  
for stock & Ry*

*Ry Co. offered  
bonds valued  
for subscrip*

required by the railroad company. Among others the defendants' testator, one David Jones, subscribed for, and was awarded \$90,000, of such contemplated loan. It is claimed by the appellant, and was found as a fact by the trial court, that Jones undertook, by the authority and for the benefit of the plaintiff, to contract with this railroad company, for a loan, under its proposal, in the name of the plaintiff, to the extent of one-half of the amount which should be allotted to him; and by this action the appellant seeks to recover, from Jones' executors, among other things, the profits claimed to have been made by him upon its share of the transaction. The right to maintain the action seems to depend upon the power of the bank to enter into the proposed contract, for if it had no lawful authority to make such a contract it could not become liable to Jones upon its obligation to take and pay for the property contracted for; and consequently there would be no consideration for Jones' undertaking to subscribe for the benefit of the bank. Not only this, but the bank could not, by suit, enforce against any one an executory contract which it was unauthorized by its charter to make.

Jones subsc'd  
was awarded  
\$49,000 He was  
Contracted  
to bank to him  
over 1/2 his allot-  
ment to it.  
He has not  
turned it over  
as paid.

It becomes necessary, therefore, to inquire into the nature of the proposed contract, and the legal capacity of the plaintiff to transact business.

[After discussing these questions, the opinion proceeds as follows:]

For these reasons, we are of the opinion that the plaintiff was not only precluded by public policy, but was not authorized by the statute under which it was organized, to enter into any engagement as a stockholder in a railroad corporation.

C was x.v.

The contract between the plaintiff and Jones was wholly executory, and nothing has occurred thereunder, preventing the bank from setting up its own want of authority to make such a contract, as a defense to any action brought thereon by Jones.

ex y + b/c  
repudiate it  
as x.v.

While executed contracts, made by corporations in excess of their legal powers, have, in some cases, been upheld by the courts, and parties have been precluded from setting up, as a defense to actions brought by corporations, their want of power to enter into such contracts (*Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 id. 62; *Woodruff v. E. R. Co.* 93 id. 618), this doctrine has never been applied to a mere executory contract which is sought to be made the foundation of an action, either by or against such corporations. It was said by Judge SELDEN, in *Tracy v. Talmage* (14 N. Y. 179), "That a contract by a corporation, which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny." In *White v. Buss* (3 Cushing, 448), Chief-Justice SHAW lays down the rule as follows: "It is well settled by the authorities that any promise, contract or undertaking, the performance of which would tend to promote, advance or carry into effect an object or purpose which is unlawful, is in itself void and will not maintain an action."

So unenforce-

as being to  
unlawful in

Lord MANSFIELD, in *Smith v. Bromley* (Douglas, 696), says: "If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action." In *Tracy v. Talmage*, (*supra*, 217), Judge Comstock says: "It is admitted that the contract of a corporation, which it has no legal capacity to make, cannot in its terms be enforced."

There is nothing in this case to exempt the plaintiff from the operation of the general principle determined in the cases referred to.

Jones owed no duty to the plaintiff, except that which sprang out of his engagement to purchase the stock and bonds in question; and that having failed on account of its illegality, left no enforceable obligation resting upon him. (*Lery v. Brush*, 45 N. Y. 589.) There is no pretext for the claim that the contract was in any respect an executed one, for Jones never even entered upon its performance. His subscription for the loan in his own name was in direct violation of the obligation which it is claimed that he had assumed; and it is that obligation alone which is sought to be enforced in this action. The bank, by the transaction in question, secured Jones' promise to do certain things, and has relied solely upon that promise. It has done nothing in performance of the contract, and, so far as it is concerned, the contract remains wholly executory.

Neither can Jones be treated as a trustee for the benefit of the plaintiff, a trust whereby it is attempted to accomplish an illegal purpose, is quite as objectionable as a direct contract to effect the same object.

The law does not raise an implied obligation to effectuate a purpose which is forbidden, and which cannot be effected by the parties through the agency of an express contract. (*Perry on Trusts*, § 214.)

The claim here is that a trust should be implied to enable the plaintiff to reap the profits from a transaction in which it was not authorized by law to engage. We have found no authority which supports such a claim and are unable to discover any ground upon which this action can be maintained.

It follows that the judgment should be affirmed.

All concur, except RAPALLO and EARL, JJ., dissenting.

Judgment affirmed.

942 R. 256.

76 Kan. 760. - 92 P. 1123

57 High 27, 31 A corp C<sup>d</sup> to pay it as much a year so long as he refrained & erect a certn bldg. After several payts had been made corp notified A that it no longer recognize C<sup>d</sup>. A continued to refrain & was allowed to recover on C<sup>d</sup>.

219 Pa 60

112 N.W. 657, 62.

(B) Executed Transactions. 234495

## LEAZURE v. HILLEGAS.

1821. 7 Sergeant & Rawle (Pa.), 313.<sup>1</sup>

ERROR to the Common Pleas of Bedford County.

Frederick Hillegas, the plaintiff below, (who is defendant in error), claimed the land in dispute under a warrant and survey to *Thomas Holt*, who conveyed to *George Armstrong*, who conveyed to *William Henry*, who conveyed to the *Bank of North America*, who conveyed to *James Ross*, who conveyed to the Plaintiff. On the trial several exceptions were taken to the opinion of the Court on points of evidence. *He claimed it by a chain of title in which he conveyed to a bank.*

*Tod*, for plaintiff in error.  
*J. Riddle and Thompson*, for defendant in error.  
 TILGHMAN, C. J.

The third exception was, to the admission of the deed from the *Bank of North America* to *James Ross*, to which there were two objections, first, that there was no evidence of the seal of the corporation; and second, that the corporation was incapable of receiving a conveyance of land, otherwise than by mortgage, and therefore had no estate which could be conveyed. The first exception [objection] was good.

But the great points in this cause are, the capacity of the bank to take the land conveyed by *William Henry's* deed, and afterwards to convey the same to *James Ross*. There is no doubt that a corporation must be governed by the charter, from which it derives its existence. It can do no act nor take any estate contrary to its charter. If therefore it can be shown, that the *Bank of North America*, is forbidden by its charter, either to take, or to convey, the land contained in *William Henry's* deed, the plaintiff's action cannot be supported. By the 3d section of the Act of Incorporation, (17th of March, 1787, 2 Sm. L. 399,) the bank is made capable "to have, hold, purchase, receive, possess, enjoy, and retain, lands, rents, tenements, goods, chattels, and effects of whatsoever kind, nature or quality, to the amount of two millions of dollars and no more, and also to sell, grant, &c. the same lands, &c. Provided nevertheless, that such lands and tenements, which the said corporation are hereby enabled to purchase and hold, *Can a bank take? & can't convey? law*

*It's to purch hold land*

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.



shall only extend to such lot and lots of ground, and convenient buildings, and improvements thereon erected or to be erected, which they may find necessary and proper for carrying on the business of the said bank, and shall actually occupy for that purpose, *and to such lands and tenements which are or may be bona fide mortgaged to them as securities for their debts.*" It is remarkable, that with regard to the holding of lands, the charter of this bank is more restricted than that of any other bank in the State, for all the others are enabled to hold, not only the lands which have been *bona fide* mortgaged to them by way of security for debts, but also those, "which may be conveyed to them in satisfaction of debts previously contracted in the course of their business, or purchased at sales upon judgments which shall have been obtained for such debts." This difference of restriction, must have arisen from the extreme jealousy of monied corporations which pervaded the mind of the Legislature when the *Bank of North America* was incorporated. It never could have been intended to place that bank on a worse footing than others, for it was the only one, which risked its capital on a field altogether untried in *America*, and which had the merit of rendering essential service to the *United States*, during the war of the revolution. It would be improper therefore, to carry the restriction, *by construction*, farther than the words of the law plainly import. The restriction is, that the bank shall not *purchase and hold*. *Purchasing and holding*, are very different things, and the consequences of each are very different. If the words had been, that the bank should neither purchase nor hold, then it could have done neither one nor the other. But although *purchasing and holding* might have been thought dangerous, because of the power which it would have given the bank to bring too much land into *mortmain*, yet to *purchase*, subject to the statutes of *mortmain*, which authorised the Commonwealth to appropriate the land to its own use, could be attended with no danger. This construction would satisfy the jealous policy of the Legislature, preserve the community from the danger of too great a mass of real property held in *mortmain*, and at the same time put it in the power of the Commonwealth to act towards the bank, as justice might seem to require. This is a consideration of no small importance; for when the directors of the bank accepted from *William Henry*, a conveyance of his land at a fair price, in payment of a debt *bona fide* due, it would be hard to presume, that they knew they were acting in violation of their charter. But granting that the restriction in the charter, did not extend to the simple act of *purchasing*, it may be asked, whence did the corporation derive the *right to purchase*, and what would be the situation of land purchased, without a capacity of holding. The answer is, that a corporation has, *from its nature*, a right to *purchase* lands, though the charter contains no license to that purpose. And in this respect the statutes of *mortmain* have not altered the law, except in case of *superstitious uses*. But since those statutes, it is necessary, in order to enable a corporation to *retain*

is confirmed

Restriction is to purchase & hold

Not to purchase subject to C's of mortmain

Not to purchase is implied from its nature

lands which it has purchased, to have a license for that purpose; otherwise, in *England*, the next lord of the fee may enter within a year after the alienation, and if he do not, then the next immediate lord, from time to time, has half a year to enter, and for default of all the *mesne* lords, the king takes the land so aliened, for ever. That this is the law appears from the following authorities. 2 *Black. Com.* 268, 269. *Co. lit.* 2. 6 *Vin. Ab.* 265. (*G. pl.* 2.) *id.* 266. *pl.* 8. *Jenk. Cent.* 270. 3 *Com. Dig.* 399. (*F. 10.*) *id.* 401. (*F. 15.*) 1 *Roll. Ab.* 513. 1. 35. 10 *Co.* 30. But in *Pennsylvania*, where there are no *mesne* lords, the right would accrue immediately to the Commonwealth. It has been objected however, that according to the report of the Judges of this Court, made on the 14th *December*, 1808, in pursuance of an Act of Assembly requiring them to make a report of the *English* statutes which are in force in the Commonwealth, &c., it appears, that all conveyances of land to a corporation, without license, are absolutely void. I will consider this objection. The Judges reported the following statutes of mortmain, "7 *Ed. I.* (*Stat.* 2.) 13 *Ed. I. ch.* 32. 15 *Rich. II. ch.* 5, and 23 *Hen. VIII. ch.* 10; which are in part inapplicable to this country, and in part applicable, and in force. They are so far in force, that all conveyances by deed or will, of lands, tenements, or hereditaments, made to a body corporate, are void, unless sanctioned by charter or Act of Assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity or utility." I have quoted the words of the report, and it is evident that the Judges could have no intent, nor had they power to make any addition to the statutes, or in any manner to alter them. Now by reference to the statutes, it will appear, that in all of them, except the 23 *Hen. VIII. ch.* 10; the conveyance is not absolutely void, but the estate passes to the corporation, subject as before mentioned, to the right of the several *mesne* lords, and in their default, of the king, to enter and hold in fee. But by the statute of 23 *Hen. VIII. ch.* 10, (which has been determined to extend to *superstitious uses only*, see 2 *Black. Com.* 273. 1 *Co. Rep.* 24,) uses and trusts, made and contrived in favour of religious persons, or any bodies corporate, for more than twenty years, shall be utterly void. Now the meaning of the report of the Judges is, that, according to the statute cited by them, conveyances to *superstitious* uses, are absolutely void, and conveyances to corporations, to uses *not superstitious*, are so far void, that those corporations shall have no capacity to hold the estates for their own benefit, but subject to the right of the Commonwealth, who may appropriate them to its own use at pleasure; in other words, that such conveyances have no validity for the purpose of enabling the corporation to hold in mortmain. But to support the plaintiff's title, it must be shewn that the corporation had power, not only to take by purchase, but to *alien*. In this respect I consider a corporation in the

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Corp equal to land

like an alien | situation of an alien, who has power to take, but not to hold. That an alien may take by purchase, (though not by descent,) has been settled from the earliest times. It is so laid down in *Co. Lit.* 2, and I believe has never been questioned. Neither has it been questioned, that the land is subject to forfeiture, and may be seised for the king, after office found. But it has been questioned, what is the right of the alien before office found for the king. Without reference to *English* cases, which leave the matter in doubt, we have the highest authority in our own country for saying, that until some Act done by the Commonwealth according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser, but he can convey no estate which is not defeasible by the Commonwealth. This principle was asserted by Judge STORY, who delivered the opinion of the Supreme Court of the *United States*, in the case of *Fairfax's Devisee v. Hunter's Lessee*, 7 *Cranch*, 603; and this was the opinion of the Supreme Court of *Massachusetts*, in the case of *Sheafe v. O'Neil*, 1 *Mass. Rep.* 256, cited by Judge STORY. It is reasonable in theory, and can have no ill effect in practice, that he who has a defeasible estate, may convey a defeasible estate. Provided the right of the Commonwealth to defeat the estate granted by the alien remains entire, it is immaterial who holds the land until that right be prosecuted. Supposing then, that the cases of the alien, and the corporation be similar, (and I see not how they can be distinguished,) it follows that the deed, from the *Bank of North America* to *James Ross*, conveyed a fee simple, defeasible by the Commonwealth. The counsel for the plaintiff did indeed contend, that this deed might be considered as a mortgage, though on its face it appears to be an absolute conveyance. But this construction cannot be supported. In order to carry the intent of the grantor into effect, a deed intended to operate as one species of conveyance, may be construed to operate as another, provided it contain words sufficient. But it cannot be construed so as to *destroy* the intent of the parties, as would be the case by holding this deed to be a mortgage; for it was the clear intent of both parties to make an absolute sale, and not a mortgage. When *William Henry* conveyed the lands mentioned in his deed, it was his intent, that in consideration thereof, the debt due from him to the bank should be extinguished, and the bank agreed to accept the conveyance in satisfaction of the debt. But supposing it to be a mortgage, the debt would be extinguished, and *Henry* would still remain responsible. I am clearly of opinion therefore, that it was not a mortgage, but an absolute conveyance.

Upon the whole, I am of opinion, that there was error, in admitting the deed from the *Bank of North America* to *James Ross* without proof of the corporate seal, and that there is no other error in the record. The judgment is therefore to be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

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LONG v. GEORGIA PACIFIC R. CO.<sup>26</sup>1890. 91 *Alabama*, 519.<sup>1</sup>

McCLELLAN, J. The case made by the amended bill is this: On April 23, 1888, the complainant, B. M. Long, and his wife, Amanda C. Long, executed to the Georgia Pacific Railway Co. a deed upon valuable consideration presently paid, to and of the iron, coal and oil interests and properties in and pertaining to certain tracts of land, aggregating about four thousand acres; the said Long retaining the fee to said lands, except in respect to said mineral interests, and continuing in possession thereof. The grantee is a corporation, and was and is without power to purchase and hold said land, or the mineral interests in the same. The bill seeks to have the deed declared void, because of this incapacity of the corporation, and to have the same cancelled as a cloud upon complainant's title. The bill was demurred to on several grounds, and the demurrer was sustained generally, the decree to that end being now assigned as error.

*Long deeded mineral rights on val<sup>u</sup>able consideration to the Georgia Pacific R. Co. but the bill has no power to take such bill, have deed cancelled as above*

Only those grounds of error which present the question, whether a vendor who has sold, received payment for, and conveyed land to a corporation, which had no power to hold the same, can have any relief in respect to the transaction, are discussed in argument; and to these our consideration will be confined, since it is manifest that the determination of this question, in line with the decree below, as we think it must be determined, will be fatal, not only to the present appeal, but to complainant's cause of action.

*On*

It is thoroughly well settled law, that a party to an *ultra vires* executory contract made with a corporation is not estopped to set up the want of corporate capacity in the premises, either by the fact of contracting, whereby the power to contract is, in a sense, admitted or recognized, or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction comes from the corporation itself. — *Marion Savings Bank v. Dunklin*, 54 Ala. 471; *Chambers v. Falkner*, 65 Ala. 448; *Sherwood v. Alvis*, 83 Ala. 115; *Chewacla Lime Works v. Dismukes*, 87 Ala. 344. But, where the contract is fully executed — where whatever was contracted to be done on either hand has been done — a different rule prevails. In such case, the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other. As declared by Mr. Bishop, "the parties voluntarily doing of what they have unlawfully agreed, places them, in effect, in the same position as if the contract had been originally good; neither can recover of the other

*disturbing x 4 x 5 c<sub>2</sub>*

*Rule.*

<sup>1</sup> Statement and arguments omitted. — Ed.

Dec. 20 1882. 17 Chd 76, 97. 182 MS 26. 132 MS 28.  
Trustee & Co contracts to sell to B. A can have sp. perf<sup>c</sup> 24 Ch St 28

Reason: *pari delicto* what was parted with. The reason for which is, that, since they are equally in fault, the law will help neither." — Bishop on Contracts, § 627.

The former decisions of this court are in line with this doctrine, and fully recognize the distinction between executory and executed void contracts, to the effect that, while suits to enforce the former may always be defended on the ground of their invalidity, no relief prayed upon such ground can be granted with respect to the latter. — *Morris v. Hale*, 41 Ala. 510; *Ingersoll v. Campbell*, 46 Ala. 282; *Sherwood v. Alvis*, 88 Ala. 115; *Dudley v. Collier*, 87 Ala. 431; *Craddock v. Mortgage Co.*, 88 Ala. 281. And this is the doctrine generally declared by other courts. — *Thomas v. Railroad Co.*, 101 U. S. 71; *Day v. S. S. B. Co.*, 57 Mich. 146; s. c., 52 Amer. Rep. 352; *Parish v. Wheeler*, 22 N. Y. 494; *Miners' Ditch Co. v. Tellerbach*, 87 Cal. 542, 606; *Terry v. Eagle Lock Co.*, 47 Conn. 141.

There is no question but that the case presented by the bill involved a contract on the part of the railway company to buy, and on the part of the complainant to sell, certain interests in the land described. It is equally clear that the payment of the agreed price on the one hand, and the execution of the conveyance on the other, fully executed this contract on both sides, left nothing to be done by either party in the premises, and bring the transaction within the principle we have been considering, which denies to the complainant any relief in respect to it.

The same conclusion is reached by another well established principle. It is, that when a party sells and conveys property to a corporation, which is without power to purchase and hold the same, and receives compensation therefor, there being no fraud in the transaction, he is in no sense injured or prejudiced by the incapacity of the corporation, nor can he be heard to complain of it; but the question becomes one between the corporation and the State, the sovereign alone having the right to impeach the transaction; and until it supervenes for this purpose, the corporation is vested with perfect title against all the world, defeasible only on office found. — *R. & B. Railroad Co. v. Proctor*, 29 Vt. 93; *Leazure v. Hillegas*, 7 Serg. & Rawle, 313; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411; *Lathrop v. Bank*, 8 Dana, 114, 129; *Hough v. Cook County Land Co.*, 73 Ill. 23; s. c., 24 Amer. Rep. 230; *Cowles v. Springs Co.*, 100 U. S. 55; *Reynolds v. Crawfordville Bank*, 112 U. S. 405, 413; 2 Mor. Corp. § 710.

The decree of the chancellor is affirmed; and the same result is reached in the case of B. L. Jones and B. B. Long v. Ga. Pac. Railway Co., submitted with this case, and involving the same question.

Affirmed

states that you sign to Corp's hold of ownership the mortgage is passed. To hold otherwise we render it highly dangerous to purchase any prop wh any corp had thereto for easements to own. All remedies call at attack on a corp pmsd when only gm presented was to r p d for of corp to be a conduct title. cf *Hyman v. S. Aus. Rly Co* 30 B. & 48. 9 (1871) *Medish Rf.* There may be also gm whether under any circ<sup>s</sup> reflects violat<sup>y</sup> such a prov<sup>n</sup> is more than this, & from may take ad<sup>r</sup> it as a forg<sup>y</sup> etc, but cor<sup>p</sup> is what appears to them with is necess<sup>y</sup> to be determ<sup>d</sup> in this case is this, that manner effect such a cl. may have, is known. present prop. pass<sup>d</sup> either in goods or in funds under a convey<sup>e</sup> or instrument

AMERICAN UNION TELEGRAPH CO. v. UNION  
PACIFIC R. CO.

1880. 1 *McCrary's U. S. Circuit Court Reports*, 188.<sup>1</sup>

MOTION for injunction.

The Union Pacific Railroad Co. was chartered by Congress, with power to "lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph, with appurtenances." The U. S. endowed the corporation with large grants of lands and bonds to aid in the construction, and imposed upon the corporation the duty of reimbursing the government from the earnings of the road and telegraph line. In 1866 the U. P. R. Co. leased to the Am. Union Tel. Co. all its telegraph lines, wires, poles, &c. for the whole term of the R. R. Co.'s charter and any renewals thereof; subject to the rights of the United States as set forth in the charter of the railroad company, and on the condition that plaintiff would fully perform all the duties imposed or to be imposed upon the railroad company by its charter or by the laws of the United States. The R. R. Co. received a valuable consideration in stock of the Telegraph Co., which stock the R. R. Co. applied to its own use. In Feb. 1880, the R. R. Co. assumed, of its own motion, to rescind the lease, and to resume possession and control of the property; for which purpose its agents cut certain wires running from plaintiff's offices to the main line. The Telegraph Co. filed a bill; praying, *inter alia*, for an injunction to restrain the defendants from disregarding the above contract, and from interfering with the property covered thereby, and from preventing plaintiff from reconnecting the wires, so as to restore them to their original condition before the same were cut. The defendants answered, affidavits were filed, and a full hearing was had upon the application for injunction (a temporary injunction having been allowed).

*to be used to its telegr. appar.*  
*for 4th ended & used.*  
*R. Co. received & resumes posn.*  
*by & asked to interfere.*

*Williams & Thompson, and C. Beckwith*, for plaintiffs.

*John F. Dillon, Sidney Bartlett, J. P. Usher, and A. J. Poppleton*, for defendants.

MCCRARY, CIRCUIT JUDGE.

[The learned Judge *held*, that the power which the charter confers, to "construct, furnish, maintain, and enjoy a continuous railroad and telegraph," was personal, and carried with it a duty and obligation which could not be transferred; that the contract of lease was *ultra vires*, because it transferred from the company property which was necessary to the performance by the company of its public duties; and also because it attempted to transfer certain franchises of the company,

<sup>1</sup> Statement abridged from opinion. Arguments and part of opinion omitted — Ed.

viz. the right to operate a telegraph line and to fix and collect tolls for the use of the same. The remainder of the opinion is as follows:]

On Can RCo on its own motion rescind the contract and on its own motion take possession of the lines, offices, and property, without first returning the consideration received therefor from the plaintiff. As already stated, the railroad company received from the plaintiff, in payment for the property and rights agreed to be transferred by said contracts, 17,800 shares of the capital stock of the corporation plaintiff. There is a dispute as to the value of the stock, but I believe it is not placed by any one of the deponents at less than \$150,000, while some of them place it at a much higher sum.

No case has been cited in argument, nor have I been able to find one, which holds that a court of equity, having jurisdiction of the parties to "and the subject-matter of" an illegal contract, should require one of such parties to give up what he has received under it, without requiring the other to do the same. Many cases hold that a corporation which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and the subject-matter are now before the court, it is the duty of the court, as far as possible, to place them in *statu quo*. It has been held that even in cases at common law, a contract, *ultra vires*, made between a corporation and another person, and under which the corporation has received value, which it retains, will be so far enforced as to estop the corporation from refusing payment on the ground of its own want of power. *Bradley v. Bullard*, 55 Ill. 417.

And in the case of *Thomas v. R. Co.* (Supreme Court U. S.), already quoted from at length, Mr. Justice Miller, upon this point, says: "There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. And in regard to corporations, the rule has been well laid down by Chief Justice Comstock, in *Parish v. Wheeler*, 22 N. Y. 404, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely,

On Can RCo on its own motion rescind the contract and on its own motion take possession of the lines, offices, and property, without first returning the consideration received therefor from the plaintiff.

Rule. Obligation to rescind is mutual. Court must place them in statu quo as far as possible.

the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

The present case, like the New Jersey case in which these remarks were made, is one on which the contract has been executed in part, but it differs from that case in one important particular. In the New Jersey case the court say that, "so far as it [the contract in question] has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

*exd in part*

If that case had been in equity, and it had appeared that the railroad company had received in advance the full consideration for the whole term of the lease, which it retained, while asking to be relieved from the contract, I have no doubt the court would have said: "You must come into this tribunal with clean hands; you must do equity before you can seek the aid of a court of conscience."

*What Compunct*

The contention of the railroad company is that it should be permitted to take possession of the property in controversy without process or legal proceedings. While I am clear that the contracts under which the property is held by plaintiff are *ultra vires*, there is a dispute upon that subject, and such a dispute as in my judgment cannot be determined by the railroad company of its own motion.

The right of rescission does not justify the railroad company in taking possession except by lawful means. The plaintiff has a right to be heard upon issue joined in a proper proceeding before being ejected. The present question is not whether the contracts should be rescinded and the property restored to the railroad company, but whether this should be done by the railroad company upon its own motion, and in a way to deprive the plaintiff not only of a hearing in the regular course of this court, but also deprive it of the right of appeal.

It is one thing for me to hold that the contracts are in my judgment *ultra vires*, and quite another to say to the railroad company, "You may turn the plaintiff out and take possession without giving it a day in court."

An injunction will often be granted to restrain a party from deciding for himself a question involving controverted rights, and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy. It is enough that there is a controversy to justify a court of equity in directing that it be settled by legal proceedings. *Eckelkamp v. Schroeder*, 45 Mo. 505; *Varick v. New York*, 4 Johns. Ch. 53; *Dudley v. Trustees*, 12 B. Mon. 610; *Farmers v. Reno*, 53 Pa. St. 224; *Sunsing v. Steamboat Co.*, 7 Johns. Ch. 162.

The principle settled by these and many other cases is that a party who is in actual possession of property, claiming under color of title, is not to be ousted, except by the means provided by law, and such a possession the court will protect by injunction from disturbance by any other means. For this reason, therefore, as well as upon the grounds

*Rule*



above stated, I am clearly of the opinion that the railway company cannot be permitted to oust the plaintiff from possession without process.

The injunction, heretofore granted, will be so far modified as to make it clear that the railroad company is at liberty to institute legal proceedings, either by cross-bill in this case or otherwise, to cancel and set aside the said contracts upon a return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties.

*Summary proceeds for obtaining possession. A.E. C.C.P. 1159-1179.*

ST. LOUIS, VANDALIA, & TERRE HAUTE R. CO. v. TERRE HAUTE & INDIANAPOLIS R. CO.

1892. 145 U. S. 393.<sup>1</sup>

APPEAL from U. S. Circuit Court for the Southern District of Illinois.

*Lesson by lease  
U.S. Corp. leased  
but of itself pos.*  
Bill in equity, filed in 1887, by an Illinois corporation against an Indiana corporation, to set aside and cancel a conveyance, or lease, of the plaintiff's railroad and franchises to the defendant for a term of 999 years. The lease was made in 1868. The defendants took possession of the road shortly after the execution of the lease, and have ever since operated it. The bill, as amended, prayed for a cancellation and surrender of the lease, for a return of the railroad and other property held under it, for an injunction against disturbing the plaintiff in the possession and control thereof, and for an account of the sums which the defendant had received, or with due diligence might have received, from the use and operation of the railroad and property. A demurrer to the bill was sustained by the Circuit Court (33 Federal Reporter, 440).

*Lesson pray for  
cancell; return  
of prop & acctg;  
of wh. of mgt. have  
earned.*

*Lyman Trumbull, John M. Butler, Henry S. Robbins, and Perry Trumbull, for appellant.*

*George Hoadly, for appellee.*

GRAY, J. The object of this suit between two railroad corporations, as stated in the amended bill, is to have a contract, by which the plaintiff transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the defendant for a term of nine hundred and ninety-nine years, set aside and cancelled, as beyond the corporate powers of one or both of the parties.

In short, by this contract one railroad corporation undertook to transfer its whole railroad and equipment, and its privilege and franchise to maintain and operate the road, to another railroad corporation for a term of nine hundred and ninety-nine years, in consideration of the payment from time to time by the latter to the former of a certain

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorised by the State which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other. *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630; *Oregon Railway v. Oregonian Railway*, 180 U. S. 1; *Central Transportation Co. v. Pullman's Car Co.*, 189 U. S. 24.

Lease not of both wholly void supporting no action by either

Upon the question whether this contract was *ultra vires* of either corporation, this case cannot be distinguished in principle from *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, above cited.

[After discussing the question whether the contract was beyond the corporate powers of either party, the opinion continues as follows:]

It may therefore be assumed, as contended by the plaintiff, that the contract in question was *ultra vires* of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other.

It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts, not of last resort, and present no sufficient reasons for maintaining this suit. *Auburn Academy v. Strong*, Hopkins Ch. 278; *Atlantic & Pacific Telegraph Co. v. Union Pacific Railway*, 1 McCrary, 541; *Western Union Telegraph Co. v. St. Joseph & Western Railway*, 1 McCrary, 565; *Union Bridge Co. v. Troy & Lansingburgh Railroad*, 7 Lansing, 240; *New Castle Railway v. Simpson*, 21 Fed. Rep. 533.

The English cases relied on by the plaintiff were either suits to set aside marriage brokerage bonds, as in *Drury v. Hooke*, 1 Vernon, 412, and *Smith v. Bruning*, 2 Vernon, 392; *S. C. nom. Goldsmith v. Bruning*, 1 Eq. Cas. Ab. 89; or to recover back money paid for the purchase, without leave of the Crown, of a commission in the military or naval service, as in *Morris v. McCulloch*, Ambler, 433; *S. C. 2 Eden*, 190. Those cases have sometimes been justified upon the ground that, the agreement being against the policy of the law, the relief was given to the public through the party. *Debenham v. Ox*, 1 Ves. Sen. 276; *St. John v. St. John*, 11 Ves. 526, 536; *Cone v. Russell*, 3 Dickinson (48 N. J. Eq.), 208. But Sir William Grant explained them as proceeding upon the ground that the plaintiff was less guilty than

the defendant. *Osborne v. Williams*, 18 Ves. 379, 382. And *Morris v. McCulloch* can hardly be reconciled with his decision in *Thomson v. Thomson*, 7 Ves. 470, or with the current of later authorities.

*Rule* The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355; *Spring Co. v. Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298.

While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defence in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defence effectual, and when necessary for that purpose. Adams on Eq. 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defence. Story Eq. Jur. § 700 a, and cases cited; *Simpson v. Howden*, 3 Myl. & Cr. 97; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 282.

When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, above cited; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be considered the voluntary act of the grantor. *Worcester v. Eaton*, 11 Mass. 368, and 13 Mass. 371; *Atwood v. Fisk*, 101 Mass. 363; *Bryant v. Peck & Whipple Co.*, 154 Mass. 460; *Williams v. Bayley*, L. R. 1 H. L. 200; *Jones v. Merionetshire Society*, 1892, 1 Ch. 173, 182, 185, 187.

*P. Delicty  
del. e. n.* In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers

which it had received from the State, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches. *Harwood v. Railroad Co.*, 17 Wall. 78; *Graham v. Birkenhead & C. Railway*, 2 Hall & Twells, 450; *S. C. 2 Macn. & Gord.* 146; *Ffooks v. Southwestern Railway*, 1 Sm. & Gif. 142, 164; *Gregory v. Patchett*, 11 Law Times (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co. v. Knowlton*, 103 U. S. 49; *Logan County Bank v. Townsend*, 139 U. S. 67, and cases there cited.

But the case is one in which, in the words of Mr. Justice Miller in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317. See also *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434, 468, 469; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 56, 57, 61.

Decree affirmed.

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McCUTCHEON v. MERZ CAPSULE CO.

1896. 87 U. S. Appeals, 586.<sup>1</sup>

IN the U. S. Court of Appeals, Sixth Circuit. Before TAFT and LURTON, Circuit Judges, and HAMMOND, District Judge.

Appeal from U. S. Circuit Court for Eastern District of Michigan.

Bill in equity by Merz Capsule Co. (a Michigan corporation), against the U. S. Capsule Co., R. H. McCutcheon, its president, and various other parties. Cross bill by U. S. Capsule Co. against Merz Capsule Co. Evidence was taken and both causes were heard.

Two corporations (the Merz Capsule Co. and the National Capsule Co.) and two partnerships, severally engaged in the manufacture and sale of hard, empty gelatine capsules, entered into an agreement, dated Nov. 29, 1893, for the combination and consolidation of their several properties and business interests. They agreed to organize a new corporation for carrying on said business; the stock to be divided among the above parties. They agreed to convey their respective plants, machinery, &c. to the new corporation; the value of the real estate to be determined by appraisers if necessary. In payment for these conveyances each party was to receive from the new corporation mortgage bonds to the amount of the appraised value of the property thus conveyed; the mortgage to cover all the property of every kind belonging to the new corporation. It was also agreed that none of the above parties should hereafter engage in the manufacture or sale of empty gelatine capsules.

In pursuance of the above scheme, the parties organized a new corporation under the general law of New Jersey, called the United States Capsule Co. The capital stock of this new company was allotted to the above parties. The property owned and operated by each of the parties in making and selling hard, empty gelatine capsules was valued by appraisers, as provided in the agreement, and conveyances and bills of sale executed to the United States Capsule Company. The instrument of sale executed by the appellee, the Merz Capsule Company, bears date December 21, 1893, and recites a "consideration of \$15,000, and other good and valuable consideration." In point of fact this part of the transaction is yet incomplete. No mortgage has been made by the United States Capsule Company, and no bonds have been executed for the appraised value of this property as contemplated by the agreement, though the United States Capsule Company did give to the Merz Capsule Company a certificate, reciting that the latter company was to receive bonds to the amount of the appraised value of its property when the mortgage should be made and the bonds executed.

On the same day that the above-mentioned deed was made and

<sup>1</sup> Statement abridged. Part of opinion omitted. — Ed.

delivered the Merz Capsule Company accepted a lease upon its premises, machinery, plant, etc., in consideration of a nominal rent, the lease to terminate on January 15, 1894, and thereafter continued in the use and occupation of its property, operating the plant for the purpose of working up stock on hand not included in the sale. While thus remaining in the actual possession of its premises and manufacturing plant, the Merz Capsule Company determined to withdraw from its engagements and contracts with the other parties to the agreement, being advised, as the original bill alleges, that the contract then entered upon, and the conveyance in furtherance thereof, were unlawful and in excess of its corporate powers. The motive which led to this repentance is not of great importance, though the evidence seems to make it pretty clear that disappointment in obtaining the control of the new business led to serious doubt as to the validity of the arrangement. This determination was notified to the officers and directors of the new corporation, the stock certificates were tendered back and a complete rescission was demanded. This tender was refused and rescission denied. Having also given public notice of the invalidity of the instrument under which the United States Capsule Company asserted title and right of possession to its manufacturing plant, the Merz Capsule Company resumed its ordinary course of business as an independent manufacturing corporation.

On January 22, 1894, while thus in the full and peaceable possession of its premises and the use of its machinery and appliances, the defendants are shown to have made an entry upon those premises through the officers, agents and servants of the United States Capsule Company, under circumstances of considerable aggravation, for the purpose of removing the machinery and stock of the said Merz Capsule Company, and did actually tear down a part of such machinery and remove a part thereof from the premises, and were only prevented from completely dismantling the factory by an exertion of force.

Thereupon the Merz Capsule Co. filed its original bill against the U. S. Capsule Co., McCutcheon, *et als.*; alleging in effect that the aforesaid agreement was illegal and in excess of corporate powers; that defendants, for the purpose of compelling plaintiffs to carry out the scheme, threatened further trespasses, for which the plaintiffs' remedy in damages would be inadequate; and praying that the above agreements and conveyances should be cancelled, and defendants enjoined from interfering with the possession of plaintiffs' property and premises.

The U. S. Capsule Co. answered and filed a cross bill, setting up the said agreements and conveyances as legal instruments, and praying for their specific performance.

Upon full proof the U. S. Circuit Court made a decree, restraining the U. S. Capsule Co. from the commission of further trespass, declaring the several agreements *ultra vires* and illegal under the law of Michigan, and decreeing that the title to the disputed property is

Merz Co. lease  
the premises  
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Merz Co. & the  
Merz Co. & the  
Merz Co. & the

It tends  
to show  
rescission  
of the contract

It shows the  
invalidity of  
the title, and  
the right of the  
Merz Co. to  
re-enter the  
premises

After the  
Merz Co. had  
been disman-  
tled

Bill vs.  
to enjoin  
cancellation  
of the contract  
and the  
recovery of  
damages

Cross bill  
of specific  
performance

quieted in the Merz Capsule Co. The cross bill of the U. S. Capsule Co. was dismissed.

The U. S. Capsule Co. *et als.* appealed.

Henry M. Campbell (*Russel & Campbell* were on the brief), for appellants.

Ekholm F. Conely, for appellee.

LURTON, J. [The Court held, "that the agreement of Nov. 29, 1893, as to the Merz Capsule Company, and the subsequent conveyance and bill of sale to the United States Capsule Company made in furtherance of that agreement, are inoperative, null and void, as in excess of its corporate powers." "Being *ultra vires*, the consent of its stockholders cannot legalize or vitalize the transaction." The opinion then proceeds as follows:]

The final objection urged by the appellants is that, if the agreement between the Merz Capsule Company and its associates is subject to the objection that it was unauthorized by its organic law and contrary to the public policy of Michigan, the objection cannot be urged by that corporation as a ground for affirmative relief in a court of equity. Undoubtedly, if the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, and has not been repudiated by the defendant, neither a court of law nor of equity will lend its active assistance to the recovery of property or money paid on such a contract, or aid in bringing about its surrender or cancellation. The doctrine of the courts applicable was stated very aptly by Mr. Justice Gray, in *St. Louis, Vandalia and Terre Haute Railroad Company v. Terre Haute and Indianapolis Railroad Company*, 145 U. S. 393, 407, when he said: "The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355; *Spring Co. v. Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298. While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose."

But this rule, by which the defense of *particeps criminis* is sanctioned by courts, as stated by Lord Truro in *Benyon v. Nettlefold*, 3 Macn. & Gord. 94, 101, and approved by Lord Selborne in *Ayerst v. Jenkins*, is rested "on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection." But in the case last cited Lord Selborne notices a very obvious limitation, by saying: "When the immediate and direct effect of an estoppel in

Agree. convey  
sale. U. S.

McC urges  
that Co. can't  
seek aff  
relief in eq.

dict X

Thus true if  
Co. & parties  
are in p. delict

But rule  
in p. delict is  
based on pub  
pol. If then

resulting from one party relief w/ l to effectuate unlawful obj. should not be allowed

equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud; such an estoppel may well be regarded as against public policy." L. R. 16 Eq. 275, 288.

The contract in the case at bar between the parties *in pari delicto* is in a large degree still executory. Though a deed and bill of sale have been executed and delivered in furtherance of the original agreement, possession has not been surrendered, and the bonds to be delivered in payment have neither been delivered nor executed. The conveyee under the deed has indeed applied to this court, through its cross bill, for the specific performance of the agreement by being placed in possession under the deed, and for an accounting with the appellee. There is an obvious distinction between the attitude of a complainant asking relief against an unexecuted agreement, illegal for reasons not appearing upon its face, and where it is sought to recover back money or property paid upon a contract fully executed. The cases stating this distinction are referred to and commented upon by Lord Cottenham, in *Simpson v. Lord Howden*, 8 Myl. & Cr. 97 *et seq.*, by Lord Selborne, in *Ayerst v. Jenkins*, L. R. 16 Eq. 275, and by Mr. Justice Gray, in *St. Louis, Vandalia and Terre Haute Railroad Company v. Terre Haute and Indianapolis Railroad Company*, 145 U. S. 393.

In *Whaley v. Norton*, 1 Vernon, 482, 483, the Master of the Rolls said "that there would be a difference in these cases between a contract executed and executory, and that this court would extend relief as to things executory, which if done, it may be might stand." The case of *Spring Company v. Knowlton*, 103 U. S. 49, is highly instructive, and supports the proposition that affirmative relief may be extended to one of the parties *in pari delicto*, where the contract is unexecuted and he is desirous of rescinding it, provided the contract was not one *malum in se*.

The specific performance sought under the cross bill has rendered necessary the expression of a definite opinion as to the validity of the contract thus set up by the United States Capsule Company. In view of this opinion, necessitating an affirmance of the decree, as far as it dismissed the cross bill, ought we to stop at this point and decline to grant any part of the relief sought by the appellee? The Merz Capsule Company does not seek to recover back either property or money paid or delivered under its agreement or deed. Before actually surrendering possession of its premises, machinery and appliances, or transferring its patents and processes, it repudiated the whole scheme and tendered back all that it had ever received, and has kept that tender good. But it has neither lost possession nor received the bond payment it was entitled to receive. Having given notice of its purpose to go no further in an illegal scheme, it remained in the peaceable possession of its property and in the ordinary conduct of its business. Without resorting to legal proceedings, the United States Capsule Company sought to obtain possession of the property of the recalcitrant grantor, and, when pre-

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largely X4



vented by force from accomplishing its unlawful object, avowed its purpose by a repetition of the trespass to obtain a possession which it could not secure by a resort to legal procedure. The effect of a continuance of these unlawful methods to obtain possession, as shown by the pleadings and proof, would be most injurious to the business of the complainant, and the remedy at law inadequate. Under all these circumstances, to hold that the complainant is estopped to rely upon the illegality of the agreement and conveyance to which it was a party would be to effectuate an unexecuted, unlawful object, and aid in the defeat of a legal prohibition. The door of this court should not be closed against one seeking to extricate himself from an unlawful connection, provided relief is sought without delay and before the contract is executed, or other persons have irrevocably acted in reliance upon its supposed legality.

The decree of the court declaring the illegality of the agreement of November 29, 1893, and of the deed of December 21, 1893, and restraining the appellants from interfering with the title or possession of the appellee under color thereof, should be, and accordingly is,

*Affirmed.*

## § FAYETTE LAND CO. v. LOUISVILLE & NASHVILLE R. CO.

1896. 93 Virginia, 274.<sup>1</sup>

### APPEAL from Circuit Court.

Bill in equity by L. & N. R. Co. against Fayette Land Co. *et als.*, to enforce payment for land sold by plaintiffs to defendants. In 1888, Flanary and wife conveyed to H. M. Smith, agent, a tract of 330 acres in Wise County, Va. In this transaction Smith was acting as agent for the L. & N. R. Co. In 1890 the L. & N. R. Co. conveyed to the Fayette Land Co. this tract, reserving a right of way and a depot site. One third of the purchase money was paid down. The remainder was payable in 1891 and 1892; and the vendor retained a lien on the land conveyed. H. M. Smith united in the deed to the Fayette Land Co. The bill avers that the balance of the purchase money is still unpaid, and prays that the defendant company may be required to pay it. Such proceedings were had that the Circuit Court entered a decree in favor of plaintiff for the balance claimed.

*J. H. Fulton, E. M. Fulton, R. C. Minor, and R. T. Irvine*, for appellant.

*J. F. Bullett, Jr., and H. C. McDowell, Jr.*, for appellee.

KERRH, P. [After stating the case, and disposing of other assignments of error.]

These preliminary matters having been disposed of, we come now to

<sup>1</sup> Only so much of the case is given as relates to one point. — Ed.

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Mergas in pair  
delivered / effect  
note with pay  
orig.

the seventh assignment of error, which is that the court erred in giving a decree against the appellants on the merits.

The Louisville & Nashville R. R. Co. is a Kentucky corporation, authorized by an act of Assembly of this State, approved March 30, 1887 (Acts Extra Session, 1887, p. 19), to construct and operate a line of railroad in Virginia. By that Act it is made subject to all the limitations and restrictions imposed by the laws of Virginia upon railroad companies, and it is contended by appellant that Sec. 1073 of the Code of 1887, which is as follows:—

“The land acquired by any company incorporated for a work of internal improvement along its line generally, shall not exceed one hundred feet in width, except in deep cuts, and fillings, and then only so much more shall be acquired as may be reasonably necessary therefor; the lands which it may acquire for buildings or for an abutment along its line generally, shall not exceed three acres in any one parcel; and the land which it may acquire for buildings, or other purposes of the company at the principal termini of its work, or any place or places within five miles of such termini, shall not exceed fifteen acres in any one parcel; but in the case of a railroad company, land not exceeding forty acres in any one parcel may be acquired for its main depots, machine shops, and other necessary purposes connected with the business of said company,”

— renders the appellee incapable of acquiring or taking title to the real estate set out and described in its bill, and that therefore no title passed from it to the appellant, but that it is or was absolutely void or conveyed at most a defeasible title, the land being subject even in the hands of an alienee from a railroad company to be escheated to the Commonwealth. It may be conceded that if this were a bill for specific performance of a contract that the relief would be denied. See *Case v. Kelly*, 133 U. S. 21. But such is not the case. The agreement of the parties has been fully executed.

Section 1068 declares that:

“Every corporation, in respect to which it is not otherwise provided, shall have perpetual succession and a common seal . . . ; that it may contract and be contracted with, purchase, hold, and grant estates, real and personal, and make ordinances, by-laws and regulations . . . for the management of its estates, and the due and orderly conducting of its affairs.”

This section is but declaratory of the common law.

Section 1070 declares:

“No incorporated company shall hold any more real estate than is proper for the purposes for which it is incorporated,” &c.

This again is but a recognition of the common law principle.

Section 1072 provides the mode in which a company incorporated for internal improvement may enter upon land for the purpose of examining and surveying it.

Section 1073 has already been quoted in full.

*Conveyance void* | That the conveyance of this land to the Louisville & Nashville R. R. Co. was not void is abundantly established by authority.

*Randall v. Ry.*

In the case of *The Banks v. Poitiaux*, 3 Rand. 136, it appears that the banks were by their charters authorized to hold such real estate "as was requisite for their immediate accommodation in relation to the convenient transacting of their business." Upon the lands purchased by the banks in that case they proceeded to erect buildings for the transaction of their business, and on either side of the buildings so erected there remained a vacant space, which they sold to the appellee; he failing to pay as agreed, the bank filed a bill for specific performance, and the chancellor decreed that the banks had exceeded their powers in purchasing and selling the property in question, it not being necessary in relation to the transaction of their business. Upon appeal it was held that while the power to acquire may be limited, restrained or prohibited, either by the charter creating the corporation or by a general law, such was not the effect of the charters in question, because the acts creating the charters are, with respect to the quantity of real estate which they were capable of holding, only directory.

"They impose no penalty in terms. They do not declare the purchase by, or conveyance to, the banks to be void, nor vest the title in the Commonwealth, or any other than the banks, in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer that title to any other. If, in making the purchase of the land in question, the banks violated their charters, the corporation might, for that cause, be dissolved by a proceeding at the suit of the Commonwealth; and even in that case, it seems to be the better opinion, the property, if not previously conveyed to some other, would revert, upon the dissolution of the corporation, to the grantor, and not to the Commonwealth. But, any conveyance made by the corporation, before its dissolution, would be effectual to pass its title. The banks have, therefore, a title which they can convey to the appellee, and which would, in his hands, be indefeasible. It would seem extremely inconvenient, if every contractor with one of these banks could, for the purpose of avoiding his contract, institute the enquiry whether the bank had violated its charter."

In *Silver Lake Bank v. North*, 4 Johnson's Reports, the same principle is recognized.

In *Bank v. Matthews*, 98 U. S. 621, it is said: "Where a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void."

In *Mallett v. Simpson*, 94 N. C. 37, it was held that although a corporation is forbidden by its charter to hold real estate, yet a deed of land to it is valid, "and even when the right to *acquire* real property is limited by the charter, and the corporation transcends its power in that respect, a conveyance to it is not void, but only the sovereign can

object. It is valid until assailed in a direct proceeding instituted by the sovereign for that purpose."

In *Nat. Bank v. Whitney*, 103 U. S. 99, the bank had taken security upon real estate for a loan which it was prohibited to do by the National Banking Law. Mr. Justice Field, delivering the opinion, said that "the statute did not declare such security void, but was silent on the subject; that had Congress so intended it would have been easy to say so, and it can hardly be presumed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision." And, after citing numerous cases where a disregard of statutory prohibitions has not been held to vitiate the contracts of parties, but only to authorize actions by the Government against them, the court held that the prohibitory clauses of the banking law did not vitiate real estate securities taken for loans, and that a disregard of them only laid the association open to proceedings by the Government. . . . "That has always been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to enforce its application."

In *Fritts et als. v. Palmer*, 132 U. S. 282, it is said by Mr. Justice Harlan, "that where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." \*

The text writers are to the same effect. In 1 Beach on Corp., Sec. 378, it is said:

"No party except the State can object that a corporation is holding real estate in excess of its rights. Accordingly, under an Act which forbids a foreign corporation to 'acquire and hold' real estate, a deed of conveyance of land to such corporation is not void. It passes the title, and the corporation may hold the land subject to the Commonwealth's right to escheat. The Commonwealth alone can object to the legal capacity of a corporation to hold real estate. There must be a direct proceeding by the State for the purpose of vacating the deed."

In Thompson on Corporations, Sec. 5795, it is said:

"Although a corporation may be disabled or forbidden from holding land at all, or from holding land for particular purposes, or from holding land beyond a prescribed limit, yet if it does hold land in the face of such disabilities or prohibitions, its title will be good except as against the State alone, and that it will be deemed to have a good title until its title is invalidated in a direct proceeding instituted by the State for that purpose."

And in Sec. 5797. it is said:

"Although the State might, in a direct proceeding for that purpose, have overthrown the title of the corporation and escheated the property to its own use, yet, not having done so, the corporation may in

the meantime convey an indefeasible title to another, of whatever estate in the lands had been conveyed to or acquired by it."

The doctrine that the State alone can interfere seems to rest upon the principle suggested in *The Banks v. Poitiaux*, *supra*, that it would be extremely inconvenient if every contractor with corporations might, for the purpose of avoiding their contracts, be permitted to institute enquiry as to violations of the charter. It is a question which concerns public interests, and the State alone is competent to protect and defend them. *Runyan v. The Lessee of Coster*, 14 Peters, 122; *Wroten's Assignee v. Armat & als.*, 31 Gratt. 251.

Enough has been said to show that the conveyance to the Louisville & Nashville Railroad Company was not void, but that it served to vest the title in the appellant.

Is the deed voidable? As we have seen in discussing this first branch of this assignment of error, no one can be heard to question the right of a corporation to acquire and hold real estate, except the State by which the corporation was created, or that State within whose limits and by whose permission or authority, express or implied, it does business, and it must do so by a direct proceeding instituted for that purpose.

There is much plausibility in the suggestion of the appellee that Sec. 1073 was designed to prohibit the acquisition of real estate by means of the exercise of the right of eminent domain, or by condemnation, as it is called, except to the extent and within the limits and in the mode appointed by that section.

By Sec. 1068 corporations are authorized to purchase and hold real estate without any limitation whatsoever; by Sec. 1070 they are prohibited to hold more real estate than is proper for the purposes for which they are incorporated. In order to give full effect to these sections as well as to Sec. 1070, there is much room to contend that the first regulates the acquisition of real estate by contract, and that the last applies to proceedings by corporations for the condemnation of real estate.

But, granting that Sec. 1073 applies to the acquisition by corporations of real estate without respect to the mode of acquisition, none of the sections referred to declare that the title shall be void. As was said in *The Banks v. Poitiaux*, the statute law is only directory in this respect. It imposes no penalty in terms. It does not declare the purchase by or the conveyance to the banks to be void, nor vest the title in the Commonwealth in consequence of such purchase and conveyance. The only penalty incurred is that which waits upon every violation of its charter by an incorporated institution. The impending danger of a judgment of onster and dissolution is, we think, the only check contemplated by the law. That has always been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority may see fit to enforce its application. See *National Bank v. Whitney*, *supra*.

Doctrine  
of convenience

The statute of mortmain has never been adopted into the jurisprudence of this State. Lomax's Dig., 2 ed., p. 815; *Rivanna Navigation Co. v. Dawson*, 3 Gratt. 21; *Conrad v. Marshall*, 5 Call, 364. It is safe to say, therefore, that there is no proceeding authorized by the common law of Virginia under which lands acquired by a corporation in violation of its charter can be forfeited to the State. } *v. infra.*

Is there any statutory authority by which it can be done? Chapter 105 of the Code is upon the subject of "Escheats and Property Derelict." It provides for the appointment of an escheator in every county; and Sec. 2374 directs each commissioner of the revenue annually to furnish the escheator of his county or corporation with "a list of all lands within his district of which any person shall have died seized of an estate of inheritance intestate, and without any known heir, or to which no person is known by him to be entitled."

We have seen that by the deed from Flanary and wife the title passed to and vested in Smith as the agent of the Louisville & Nashville R. R. Co., and by a subsequent deed it was conveyed to the Louisville & Nashville R. R. Co. directly. The land in controversy, therefore, does not come within the terms of the section just quoted, for the commissioner of the revenue could not in the face of the conveyances of record rightfully say that there is no person known by him to be entitled to it.

It appears further that this property has been conveyed by deed from the appellee to the appellant, and that no proceedings have been taken by the State to revoke the privileges given the appellee by the Act of Assembly before referred to. Acts of Special Session 1887, p. 19.

The deed of the Louisville & Nashville R. R. Co. was, therefore, effectual to pass its title to the land in controversy and vest it in the Fayette Land Company. See *The Banks v. Poitiaux*, 3 Rand. at page 142; and 5 Thomp. Com. on the Law of Corp., Sec. 5797, and cases there cited.

We are of opinion, therefore, that the seventh assignment of error is not well taken, and, upon the whole case, the decree complained of must be affirmed.

*Affirmed.*

133 Cal 611. *People v. Lockton & Co. Soc.* (1901). To escheat to, & certain lands held for more than 5 yrs. Act based on Art. XII § 9 Const. No corp shall engage in any bus other than that expressly auth'd in its charter, or law & it may have been or may hereafter be org'd; nor shall it hold for a longer period than 5 yrs any RE, ex cept such as may be necessary for carrying on its bus. "The event fails to de- clare & declarator, & com to effect that this provision is mandatory, prohibitory accomplishes an escheat under facts, this case. The provision says nothing, whether in absolute escheat. Escheats of forfeitures are in favor of, law & why some penalty other than an escheat did not be declared to follow a viol'n. This provision, & const. is not made plain. The provision is wholly fails to declare what results follow if it is violated. And for this reason it seems to be a p. to prescribe penalties for its viol'n. There appears nothing in provision so self-executing as to say & punish." ... CC § 74 sub 2 (See Chancery) provides that lands held by Corp under mps must be sold w/ 5 yrs. The ct feels satisfied that such is purpose & intention of const. provision when it declares that a corp shall not hold re. In other words, const. provision declares of this character. RE shall be sold w/ 5 yrs period. If corp does not sell as commanded by K. Statute may be provided by ct for its failure to do so or for some of procedure might be invoked compelling a sale of land or a part of it.

<sup>90</sup> PRESCOTT NATIONAL BANK v. BUTLER.

By Coassumes U.V. to purch. a negot. instr.  
1893. 157 Massachusetts, 548. *enforce it vs prior parties*

CONTRACT, upon a promissory note for \$12,500, dated June 13, 1886, and made payable four months thereafter to the order of the defendant, and by him indorsed. Trial in the Superior Court, without a jury, before Braley, J., who found for the plaintiff for the full amount of the note with interest; and the defendant alleged exceptions. The facts appear in the opinion.

*J. N. Marshall*, for the defendant.

*S. Hoar* (*W. Sullivan* with him), for the plaintiff.

KNOWLTON, J. The defendant contends that the plaintiff cannot recover; first, because it has no title to the note; and secondly, because the note was made on the Lord's day, in violation of the statute. It is argued that, under the statutes of the United States, national banks cannot buy or sell promissory notes, and that, inasmuch as the plaintiff obtained the note by purchase, it has no right to hold or collect it.

On the question whether a national bank can buy promissory notes in the market as a natural person can, there is a conflict of authority. Its power to do so, if it has any, is conferred by the U. S. Rev. Sts. § 5136 (13 U. S. Sts. at Large, 101), which authorizes national banks to discount and negotiate "promissory notes, drafts, bills of exchange, and other evidences of debt," etc. It has sometimes been held that the right to discount and negotiate notes, etc., goes no further than to authorize the taking of them in return for a loan of money made on the strength of the promises contained in them. *Lazear v National Union Bank*, 52 Md. 78, 124; *Farmers & Mechanics' Bank v. Baldwin*, 23 Minn. 198; *First National Bank v. Pierson*, 24 Minn. 140; *Niagara County Bank v. Baker*, 15 Ohio St. 69. By other courts it has been held that the right to "discount and negotiate" includes the right to buy. *Smith v. Exchange Bank*, 26 Ohio St. 141; *Pape v. Capital Bank*, 20 Kans. 440. See also *First National Bank v. Harris*, 108 Mass. 514, 516; *National Pemberton Bank v. Porter*, 125 Mass. 333; *Atlas National Bank v. Savery*, 127 Mass. 75, 77.

If we assume, in favor of the defendant, that national banks are not authorized under the law to go into the market and buy promissory notes from those who are selling them only as a commodity, there are several reasons why this defence cannot prevail. In the first place, if such a purchase is *ultra vires*, it is an ordinary contract; it is not made penal nor expressly forbidden, and the maker or indorser cannot defend on the ground that the bank has obtained no title. The violation of law can be availed of only in proceedings against a national bank, in the interest of the public, to deprive it of its charter. This has been decided by the Supreme Court of the United States. *National Bank v. Matthews*, 98 U. S. 621, and cases

where Co assumes v. v. to purchase a chattel the Co may enforce a usual mortgage. owners of  
- from v. v. member of his party 8 P.C. 548. Vendor can bring from v. Co 41 Ala 510, 37  
May recover on C if it sells to B. 148 Mass 420  
where it buys a non negotiable chose it may enforce it as any other assignee of 68 Neb 841  
CO 96 Mo 10.

cited; *National Bank v. Whitney*, 103 U.S. 99; *Merchants' National Bank v. Hanson*, 33 Minn. 40; *Slater Woollen Co. v. Lamb*, 143 Mass. 420.

Secondly, the evidence in this case would well warrant, if not require, a finding by the court that the transaction was a discounting of a note for the defendant within the meaning of the statute. The note was in the hands of the indorser's agent, who consulted the indorser about the rate of interest to be allowed before giving the note to the plaintiff. The plaintiff's money was paid to the indorser, less the agent's commission. The transaction would have been no different in substance if the defendant, who held the note as indorser, had carried it to the plaintiff's bank, and had there made in person the contract which he made through the agent. If he had done that, the transaction clearly would have been a negotiation of a loan and a discounting of a promissory note. *Lazear v. National Union Bank*, 52 Md. 124; *Farmers & Mechanics' Bank v. Baldwin*, 23 Minn. 198; *First National Bank v. Pierson*, 24 Minn. 140.

Thirdly, it has been held in this Commonwealth, in analogy with the above cited decisions of the Supreme Court of the United States, but on somewhat different grounds, that, even if a national bank does not get the legal title to a promissory note bought in the market, it may maintain a suit as the holder, and the maker and the indorsers cannot be relieved from their contracts to pay the holder the amount promised in the writing. *Atlas National Bank v. Savery*, 127 Mass. 75, 77; *National Pemberton Bank v. Porter*, 125 Mass. 333.

*Exceptions overruled.*

41 CALIFORNIA NATIONAL BANK v. KENNEDY. 1897.

Should a corporation have had benefit of owners if he allowed to escape its liabilities  
1897. 187 United States, 382.1

**ERROR** to the Supreme Court of California.

Kennedy, the original plaintiff, is a creditor of the California Savings Bank, which is now insolvent. He seeks to recover against the California National Bank, upon the ground that it was a stockholder in the Savings Bank and consequently liable under the statute of California to pay the debts of the Savings Bank in proportion to the amount of stock held therein by the National Bank. It appeared that a certificate for shares in the Savings Bank was issued in the name of the California National Bank, and that the National Bank received dividends on savings bank stock. At the hearing the National Bank made the point that the Savings Bank stock was not taken by the National Bank in the ordinary course of the business of the National Bank as security for the payment of a debt or otherwise. It was also contended that the National Bank could not in law become a stockholder or incorporator in any other corporation. The Supreme Court of California rendered judgment against the National Bank. 101 California, 495.

*Edward Winslow Paige*, for plaintiff in error.

1 Statement abridged. Part of opinion omitted. — Ed.

Cal Nat Bk v. acquires stock in Cal Sav Bk & gets div<sup>d</sup> out so liable on staty shls liab.



will collat attack on act u.v. be allowed?  
Sp. Corp M by u.v. act buys stock Corp N. A usual accident, ownership shares w/nt to vote. Yet it may be improper to permit M to vote. Why? The law forbids one Corp to own shares in another largely to prevent one & control or influence? - manual corp. No.

George Fuller, H. E. Doolittle, and T. L. Lewis, for defendant in error.

WHITE, J.

The Federal questions which therefore arise on the record may be thus stated: 1st, do the statutes of the United States, Rev. Stat. § 5136 *et seq.*, relating to the organization and powers of national banks, prohibit them from purchasing or subscribing to the stock of another corporation? and, 2d, if a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?

*As to the first question.* — It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank v. Townsend*, 139 U. S. 67, 73. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank v. Case*, 99 U. S. 628. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First National Bank v. National Exchange Bank*, 92 U. S. 122, 128.

On behalf of the plaintiff below it was admitted at the trial that the stock of the savings bank was not "taken as security or anything of the kind," and it is not disputed in the argument at bar that the transaction by which the stock was placed in the name of the bank was one not in the course of the business of banking for which the bank was organized.

2. The transfer of the stock in question to the bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?

Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases of *Thomas v. Railroad Company*, 101 U. S. 71; *Pennsylvania Railroad v. St. Louis, Alton & Co. Railroad*, 118 U. S. 290; *Oregon Railway & Navigation Co. v. Oregonian Railway Co.*

permitted M to vote might be to permit very evil intended to be prevented. It is the expense of N an innocent party. If M u.v. buys N's stock & causes the corporation to refuse M. 360k of 250. Even if M is registered as stock it may have no vote. 100; 512k 230; 657k 247; 640k 20 25 Mash 193,50 89 224 229; 155 2369; Cf also 50k 4599 + 120k 2500, 610. It must be that suffered a loss. M made a u.v. purchase of a note. A. M was not allowed to set off note vs loan. 7/10/95, 475, 495.

Since in special cases it may collaterally attack an "fraud" with means to exercise  
 of former of may McCallat attack x<sup>o</sup> fraud to escape liability owners. It may if fact is  
 that c officers as distinct as Shh. Cohen adopts it. see p 170. ref 28 Ch D 677.  
 But surely not of collat de ratify. Otherwise McCallat's benefits as officer liable as in v Shh.  
 cf 127 Sa 691; 90 Munn 252; 117 N. W. 211, 218; 9 N. D. 467, 76; 101 Pa. 204.

130 U. S. 1; *Pittsburgh, Cincinnati &c. Railway v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24; *St. Louis &c. Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393; *Union Pacific Railway v. Chicago &c. Railway*, 163 U. S. 564, and *McCormick v. Market Nat. Bank*, 165 U. S. 538, recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that, to quote from the opinion of the court in *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 59 to 60:—

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." § 339. \*

This language was also cited and expressly approved in *Jacksonville &c. Railway v. Hooper*, 160 U. S. 514, 524, 530.

As said in *McCormick v. Market National Bank*, 165 U. S. 538, 549:—

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441; *Pittsburgh, Chicago &c. Railway v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 384; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 48."

The doctrine thus enunciated is likewise that which obtains in England. *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Attorney-General v. Great Eastern Railway Co.*, 5 App. Cas. 473; *Baroness Wenlock v. The River Dee Company*, 10 App. Cas. 354; *Trevor v. Whitworth*, 12 App. Cas. 409; *Oregum Gold Mining Co. of India v. Roper*, (1892) App. Cas. 125; *Mann v. Edinburgh Northern Tramways*, (1893) App. Cas. 69.

Applying the principles of law thus settled to the case at bar, the result is free from doubt.

The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers ex-

*McCormick Co. - Natl BK assumed that a lease had been assigned, Comphellie to transact  
 & declared lease void (p. 58) May J. Natl BK. Matth. "dependent on § 518) R. 3 specifying purposes  
 for which Natl BK might purchase, hold & convey R.E. not as conclusively & did not make void  
 unless taken for other purpose & etc. Corp"*

pressly conferred. A dealing in stocks is consequently an *ultra vires* act. Being such, it is without efficacy. *Pearee v. Railroad Company*, 22 How. 441, 445. Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred. (Cook on Stock and Stockholders, vol. 1, p. 435, note 1 to sec. 316, and authorities there cited.)

In *The Royal Bank of India's Case*, L. R. 4 Ch. 252 (1869), while it was held by the Court of Appeal that, as incidental to the power to advance money on a deposit of shares of stock, a corporation might do such acts as were reasonable and proper for making the security available, it was conceded that a purchase of stock of another company as a speculation would have been *ultra vires*, and, despite acts of ownership exercised by the company, the shares might be repudiated at any time.

Sir C. Selwyn, L. J., said (p. 261): —

"If it could have been shown that it was an act absolutely prohibited by their memorandum of articles of association, then, no doubt, a different question would have arisen; the act would have been *ultra vires* and incapable of confirmation or ratification."

Sir G. M. Giffard, L. J., said (p. 262): —

"I quite agree that the Royal Bank of India had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires*, and all that has taken place would not have been enough to constitute the Royal Bank of India shareholders in this bank, or prevent them from repudiating these shares."

The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in no wise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error. *National Bank v. Whitney*, 103 U. S. 99; *National Bank v. Matthews*, 98 U. S. 621. The difference between those cases and one like this was referred to in *McCormick v. Market National Bank of Chicago*, *supra*, and it is, therefore, unnecessary to particularly review them. The claim that the bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified. As was said by this court in *Union Pacific Railway v. Chicago &*

\* These neg. C - of promises - is involved. If n. dispute under parties - but whether to  
for & Corp wishes to take. The rights involved public are n. involved. The only obj. is  
that as vs. St. & taking is unauthorized. If St. does it wish to object & a fort. if it has waived its  
right to object) is on occas. to allow them or neat of this to arrange. In oppo. to will  
The danger to public possibly arising large aggregation of prop in hands of Corp is suffic  
quarant against by, for discharge, & St

TRUSTEES OF DAVIDSON COLLEGE v. CHAMBERS' EXECUTORS. 347

Railway, 163 U. S. 564, speaking through Mr. Chief Justice Fuller  
(p. 581): —

"A contract made by a corporation beyond the scope of its powers,  
express or implied, on a proper construction of its charter, cannot be  
enforced, or rendered enforceable by the application of the doctrine of  
estoppel." *Follows*, 174 U.S. 664; 200 U.S. 425; 202 U.S. 295. *Reversed.*

120/601.6cc. —

(c) *Devises and Bequests to Charitable Corporations.*

\* TRUSTEES OF DAVIDSON COLLEGE v. EXECUTORS AND  
NEXT OF KIN OF MAXWELL CHAMBERS.

1857. 3 Jones Equity (North Carolina), 253.1 JNC.

BILL in equity, originally brought against the executors of Cham-  
bers, alleging that, by the will of Chambers, legacies to a large  
amount were bequeathed to plaintiffs, and that assets sufficient to pay  
the same had come to the hands of the executors; and praying that  
the defendants might be decreed to pay over the same. The cause  
was set down for hearing upon the bill, answer, and exhibit. The  
Court remanded the case for the purpose of making additional  
parties.

Bill & next  
of kin to decree  
the payt. Coll  
a bequest or  
part of & devise  
(Ref.)

The bill was amended, according to the suggestion of this Court,  
by making the next of kin and the heirs-at-law of Maxwell Chambers,  
parties defendant. Process was also issued to the Attorney General  
as the representative of the State, and to the trustees of the Uni-  
versity.

An Act of Assembly was passed after the death of Chambers,  
extending the corporate capacity of the plaintiffs, so as to enable  
them to hold property to the amount of \$500,000, and relinquishing  
to the plaintiffs any interest which the State or University might  
have in the fund.

Act. Assembly  
passes after test  
relinquish & St

Graham, Osborne and Wilson, for the plaintiffs.

Winston, Sr., for the executors.

Jones, for the next of kin.

Bailey, Attorney General, filed a copy of the Act of Assembly above  
mentioned, and declined further appearing.

PEARSON, J. The charter of the college (act of 1838) enacts among  
other things: Sec. 1. "The trustees of Davidson College shall be able  
and capable to purchase, have, receive, take, hold, and enjoy in fee  
simple or lesser estates, any land, &c., by gift, grant, devise, &c.; and  
shall be able and capable, in law, to take, receive, and possess all  
moneys, goods and chattels, that have been, or shall hereafter be  
given, sold or bequeathed, for the use of said college, &c." Sec. 10.  
"Be it further enacted, that the whole amount of real and personal  
estate belonging to said college, shall not at any one time exceed in  
value, the sum of two hundred thousand dollars."

<sup>1</sup> Statement abridged. Portions of the opinions omitted. — Ed.

The testator, besides a devise of a large amount of real estate, bequeaths, for the use of the college, a *fund of personality*, which, when added to the property owned by the college at the time of his death, will greatly exceed \$200,000. We have this question: Is there any principle upon which this Court can declare, that the college is entitled to the excess of the fund, after the \$200,000 is fully made up, and decree that the executors shall pay over such excess for the use of the college? or are the next of kin of the testator entitled to the excess, on the ground, that it is not effectually disposed of by the will?

*See rule*  
The general rule is well settled: When a legacy, from any cause, fails to take effect, the subject devolves upon the next of kin of the testator, as property undisposed of; for an ineffectual disposition is no disposition at all. For instance, if a legacy fails by "lapse," i. e., the death of the legatee in the life-time of the testator; or by reason of its vagueness, as when the object of the bounty is not sufficiently described to enable the Court to say who is to take beneficially; *Bridges v. Pleasants*, 4 Ire. Eq. 26, where the object was "the poor saints;" or because the purpose of the testator is against the policy of the law, i. e., to establish an order of privileged slaves; *Lea v. Brown*, ante, 142; or, where those for whose benefit the bounty was intended, refuse to accept it; *McAuley v. Wilson*, 1 Dev. Eq., 276; or, where those for whose benefit the bounty is intended are *positively forbidden by law from owning it*, which is our case — made stronger, if possible, by the fact, that the prohibition is expressed in the very act by which the corporation is created.

*No cy pres*  
We are satisfied, after hearing a full argument in behalf of the college, that there is no principle upon which a decree can be made in its favor, in respect to the excess of the fund. In England, under the doctrine of *cy pres*, the Chancellor would direct the excess to be applied to some other charity, as near as might be, like that indicated by the testator, and if no other male Presbyterian college existed, it would be applied to a female college of that denomination. *Attorney General v. Tonna*, 2 Ves. Jun. 1; 4 Bro. C. C. 103; but our Court has never acted upon that refinement. *McAuley v. Wilson*, sup.

*No mortmain*  
*This is act in law n. act. party*  
The cases of *purchases* of land by aliens and corporations, under the statutes of mortmain, are not in point. It is settled, that an alien or a corporation may, by purchase, *take* land, but cannot *hold*; and the doctrine is put on the ground, that if one by an *executed conveyance*, which is *his own act*, passes land to an alien, or corporation, he shall not have it back; but it shall belong to the sovereign, upon office found. It is otherwise in regard to the *act of law*. If the heir, of one dying seized of land, be an alien, the law will not cast the descent on him, because he cannot hold beneficially, and the law will not give with one hand and take away with the other, but will cast the descent upon the next relation who is capable of holding. For the same reason, an alien husband does not take as tenant by the curtesy, nor an alien wife take dower.

In the case of a will of personalty, the property does not pass directly to the legatee; and the law will not require, or permit, the executor to assent to the legacy, unless it can take effect beneficially, according to the intention of the testator; but it devolves upon the next of kin, by the general rule, stated and illustrated above.

will of pers<sup>l</sup>  
prop<sup>ty</sup> pass<sup>es</sup> direct

But it is asked: Are the plaintiffs in a worse condition, because the executors declined to pay over the fund without being protected by the sanction of this Court, than if they had been willing to take the responsibility of paying it over without suit? Certainly not. Upon the death of the testator, without having effectually disposed of this fund, the rights of the next of kin "*were vested*." They could have filed a bill to prevent the executor from paying it over, or to follow the fund in the hands of the plaintiffs. This is also a full answer to the position, that the act of the Legislature, at its last session, by which the college is allowed to own property to the value of \$500,000, and all right to the fund on the part of the State or of the University is relinquished, removes the objection to the plaintiffs' recovery. The rights of the next of kin being vested, the act of the Legislature does not in anywise affect them; so, the only effect of the act, besides enlarging the amount which the college is now capable of owning, is to waive any right of the State; but as we have seen, the State had none.

h  
Rts next  
kin vested at  
once.

This being a bill against the executors only, the personalty was directly involved; but upon a suggestion, that the heirs-at-law might have an interest in the question, whether the full amount of the \$200,000 should be made up out of the personalty alone, or out of the personalty and realty devised, by rateable contribution, it was directed that they should be made parties. We are satisfied that the personalty is the primary fund, and the requisite amount must be made up out of that exclusively; for which the necessary enquiry will be directed. The bill will be dismissed as to the heirs, without costs, as they claim the legal title to the land. The question between them and the college may be presented in an action of ejectment, if the parties are so advised.

Bill vs ex<sup>ors</sup>  
since

Pers<sup>l</sup> is prim  
fund.

BATTLE, J. \*

Hence, in England, and perhaps in this State, an alien might take real property by devise, which would give him a good title to it, as against all persons but the sovereign. In analogy to this, the counsel for the plaintiffs have contended that their clients have the right to take the whole legacy bequeathed to them by Mr. Chambers, though it may be that by force of the restrictive clause in their charter, the State might, if it saw fit, take from them the excess over the value of the property which they were authorized to own. The argument would have much force — perhaps be irresistible — if the legacy vested at once and immediately, under the will, in the plaintiffs. Such is the

Adverse is as much "a" trans on ed by test<sup>r</sup> as a convey<sup>er</sup> inter vivos so x<sup>m</sup> m<sup>d</sup> deb<sup>r</sup> a deed. In latter case it must decide that paper-conv<sup>y</sup> is a deed as much as we former. It must decide it is a will. As to a bequest legatee will usually need aid to obtain the prop<sup>ty</sup> & x<sup>m</sup> will need sanction & ch<sup>ts</sup> have p<sup>ro</sup> & \$. So a ch<sup>ts</sup> might declare regard<sup>er</sup> trans<sup>er</sup> as x<sup>m</sup> m<sup>d</sup> deb<sup>r</sup> & testat<sup>r</sup>. But cases don observe Battle's dict<sup>um</sup>.

case undoubtedly in a devise of land. The devisee takes in at once by force of the will, and his title becomes complete immediately upon the death of the deviser. But the case of a legacy is well known to be different. Upon the testator's death, all his personal property becomes vested in the executor, who holds it in trust, first, for the payment of the funeral expenses, charges of administration and debts, and then for the payment of legacies; and if there be a residue undisposed of by the will, he is bound, since the act of 1789, (see 1 Rev. Stat. ch. 46, sec. 18; Rev. Code, ch. 46, sec. 24), to pay it over to the next of kin. The legatee has no legal title to the legacy until the executor shall give his assent to it. So strong is this rule, that if a legatee take into possession a specific chattel, given to him by the will, without the consent of the executor, the latter may by a suit at law recover it back; 2 Williams on Ex'rs., 845. It is true, that if, after the payment of all the debts and other legal charges upon the estate, the executor withholds his assent to a legacy, the legatee may, by a bill in equity, compel him to assent to it, and thereby give him a title to it; but it is by means of a suit in equity alone that he can get possession of a legacy, either general or specific, from an obstinate or dilatory executor. It needs the aid of a court, then, to enable the plaintiffs to recover the legacy which they claim; and the analogy to the case of an alien cannot be of much avail to them, unless we find that the law will *per se* and *proprio vigore* cast an estate upon him, or that a court either of law or equity, will lend him its assistance to obtain it.

It seems to me, that, in admitting that the State, upon office found, or otherwise, may seize and take to its own use, the excess, the plaintiffs' counsel virtually admit that it is unlawfully held by the college. Why so forfeited to the State unless because the college has it in opposition to the express prohibition of its charter? If unlawful for the plaintiffs to have it, can a court of equity assist them to get it?

NASH, C. J., *dissentiente*.

Secondly. Let it be granted, that by taking the whole of the property devised, the total amount in value would exceed what the corporation was entitled to possess, and thereby its charter might be forfeited, can the defendants, the executor, or the next of kin, take advantage of the breach of the condition in these proceedings? A charter is a contract between the corporation and the sovereign. It is well settled that none but the parties or their privies, can take advantage of a breach of a condition. Now, neither Mr. Chambers, nor his executor, nor his next of kin, are any parties or privies to the contract — upon what principle then, is it, that the executor can refuse his assent to the legacy to the college, or upon what principle can the next of kin claim it, or any portion of it? If Mr. Chambers, while in life, had donated to the college two hundred thousand dollars in cash — or its value in

Since legacy  
is vested in  
X<sup>r</sup> in trust for  
pay of expenses  
etc

the Coll / reg  
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2 H. & C. Only  
parties or privies  
can take adv.  
abv. condn

property, specified in the will, could he have been heard in a court of justice to say, that he had given the corporation too much, and they must pay back to him as much of the donation as was over and above what it could legally hold or retain? Suppose him to have brought an action for the surplus, could he have recovered? Surely not. He would be estopped, and of course, so would all persons claiming under him; *Gilliam v. Bird*, 8 Ire. Rep. 280. His death cannot alter the proposition. Whatever would estop him, must estop his personal representative, and must equally estop his next of kin, who claim through him. I cannot, therefore, see how either the next of kin or the executor of Maxwell Chambers, can deny, in this proceeding, the right of the complainants to receive the whole of the sum devised them.

But again, I hold that no one but the State, as a sovereign, can call the plaintiffs to account for receiving, or holding, a larger amount of property in value than is limited in their charter.

This [the recent act of assembly] is tantamount to a license by the Crown, and we have seen by the case from 3rd Vesey, jr., and that from Merivale, that a license from the Crown will enable a corporation to hold more property than the amount to which it was originally limited (though the license was obtained after the death of the donor), upon the principle that, by the devise or purchase of more property than they were allowed to hold, the legal estate vested in the donee, subject to the will of the Sovereign.

It is further objected, that the act of '56 could not divest the next of kin of the interest which vested in them at the death of the testator. The above cases show that no interest vested in the next of kin, for it is decided in them, that the legal estate vested in the donees. But there is another answer to this claim of the next of kin. It is in general true that a devise ought to take effect on the death of the testator; but a devise to a collegiate corporation, not then in existence, may be good. *Grant on Corporations*, 123; *Attorney General v. Downing*, Wilmot's notes, 11 and 13. In that case, the devise was to a corporation, to be established in the University of Cambridge, and to be named after the testator, Downing College, in case the Crown should grant a charter incorporating the same, and a license to hold land in mortmain. The devise was held to be good. Here, the corporation was in full existence at the time the will was executed and when the testator died. The result of the cases to which reference has been had, is that a corporation may take more than the limit in their charter, but they cannot hold it unless they obtain an extension by the Crown. *Grant*, 104. No right to any interest then, according to the authorities, did or could vest in the next of kin.

If the charter has been violated, no one but the sovereign can claim the forfeiture; and as the sovereign, by the act of '56, has waived its

of testator has given property his life time he can get it back & how can his pers rep?

Legal E vested in Coll suby to will & sh



right to vacate the charter, if there was any violation of it by the corporation, the right of the plaintiffs to receive the donation from the executor, is complete, and put beyond all doubt in my estimation.

PER CUBIAM. Decree according to the opinion of the Court.

IN THE MATTER OF THE ESTATE OF JOHN MCGRAW.

IN THE MATTER OF THE ESTATE OF JENNIE  
MCGRAW FISKE.

1888. 111 *New York*, 66.<sup>1</sup>

APPEAL from a judgment of the Supreme Court, which reversed a decree made by the Surrogate of Tompkins County on the settlement of the account of Douglass Boardman, executor of the will of Mrs. Jennie McGraw Fiske. The will of Mrs. Fiske directed that her estate "be converted into money, or available securities, as soon as can be done, having in view its best interests and results." After numerous bequests including a bequest of \$250,000 to Cornell University in trust, the will contains the following residuary clause: "I give, devise and bequeath all the rest, residue and remainder of my property (if any there shall be) to Cornell University, aforesaid, to be added to the 'McGraw Library Fund' aforesaid, and subject to the trusts, purposes, uses and conditions hereinbefore prescribed for said fund."

The Revised Statutes provide that a devise of real estate may be made to every person capable by law of holding real estate; "but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." (2 R. S. 57, ss. 1, 2, 3.) The Revised Statutes also enact, that the trustees of every college chartered by the state shall have power "to take and hold, by gift, grant, or devise, any real or personal property, the yearly income or revenue of which shall not exceed the value of twenty-five thousand dollars." (1 R. S. 460, ss. 31-37.) Cornell University was incorporated by chapter 585 of the Laws of 1865. Section 5 of the charter is as follows: "Sec. 5. The corporation hereby created may hold real and personal property not exceeding three millions of dollars in the aggregate."

The husband, next of kin, and heirs at law, of Mrs. Fiske, contended that Cornell University, at the date of Mrs. Fiske's death,

<sup>1</sup> Statement compiled from statement and opinion in 111 *N. Y.* 66, and statement in 45 *Hun*, 354. Arguments and portions of opinion omitted. — Ed.

already owned property exceeding, in the aggregate, three millions of dollars.

The amount of Mrs. Fiske's estate at the time of her death, as found by the Surrogate (including a trust fund created under the will of John McGraw, which the Surrogate held was part of the estate of John McGraw, but which Mrs. Fiske had a right to dispose of by will) exceeded two millions of dollars. After deducting the legacies to parties other than Cornell University, there was a balance of more than one million which would go to the University if the will were carried out.

The Surrogate decided that a decree should be made:

1. That the account of the executor be allowed.
2. That the executor pay over to Cornell University the sum of \$141,676.72, being the balance on hand and ready for distribution.
3. And adjudging that Cornell University is the owner and entitled to all the rest, residue and remainder of said estate, and directing said executor to pay the same, when sold, to Cornell University, in money or in such other form, or at such other time, as may be mutually agreed upon between Cornell University and the executor.

The decree of the Surrogate was reversed, upon appeal, by the General Term of the Supreme Court in the Fourth Judicial Department. (Reported 45 Hun, 354.) The case was then taken, by appeal, to the Court of Appeals.

*E. Countryman*, and *S. D. Halliday*, for appellants.

*Esek Cowen*, and *George F. Comstock*, for respondents.

PECKHAM, J.

I think the fifth section of the charter gives the measure of the power of the university to take as well as to hold property. The language is an authority as well as a limitation. It is an authority to hold more than the Revised Statutes permitted, but it shall not be permitted to hold more than a certain specified amount. And if there were nothing said on the subject of property in the charter, I think the Revised Statutes as to the limitation for colleges would apply. Reading the language in the charter, it is difficult to imagine a holding without a previous taking of property, and the counsel for the appellant admits that if there were no other statute providing for a taking of property, the language of the fifth section of the charter would necessarily imply a right to take in order to hold.

*charter 5<sup>th</sup>*

The counsel states accurately the law of mortmain in England and its consequences of possible forfeiture of the estate granted, and, until forfeiture, the vesting of the title in the corporation indefeasible, except by the re-entry of the person entitled to take it by reason of the forfeiture. But the circumstances under which lands are held by citizens of New York, where their tenure is so wholly different from that which prevailed in England when the early mortmain acts were

*Eng mortm  
acts unappl<sup>d</sup>*

enacted, render any argument in regard to those acts and their effect totally inapplicable to the case of a corporation of this state. Taking the law as it exists in our statutes, including the special provision upon the subject in the charter of the university, it seems to me that the provision therein, limiting the holding of property, is, as I have said, a restriction also upon the power to take in excess of the specified amount.

The nature of the tenure of real property at the time of the passage of the early mortmain acts in England bears no resemblance to the tenure by which a citizen of this State holds lands. Here there is no vassal and superior, but the title is absolute in the owner, and subject only to the liability to escheat. (Const. of N. Y., art. 1, § 13.) The escheat takes place when the title to lands fails through defect of heirs. (Const. of N. Y., art. 1, § 11.)

A devise to a corporation which is forbidden to take (or forbidden to hold, *if the word*, under the circumstances of the case, is construed to include a taking also) does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but if it be in violation of a statute, I think the devise is void and the land descends to the heir or residuary devisee.

Whether the legislature, when using language providing for a limitation upon holding property, meant to permit an unlimited taking, is a question of legislative intent; and I think the general inference would be, in the absence of some plain and controlling circumstance to the contrary, that the legislative body meant to limit a taking as well as a holding beyond the specified amount.

The counsel for the appellant does not claim that this property was itself forfeited to the state, if the state should choose to enforce the forfeiture. His claim is, as I understand it, that if the university exceeded its limitation by holding more property than it was allowed by law to hold, a cause of forfeiture of the charter was thereby created, and that in enforcing such forfeiture, after the payment of the debts of the corporation the rest of the property would (as he insists) probably go to the state because there would be no living claimant to it who would have any right to acquire it. A forfeiture the state may claim and may enforce at pleasure, when the occasion arises, but it is a forfeiture of the charter and not a forfeiture of the property held by the corporation. It is further claimed that this distinction between the right to take and the power to hold property is one which has been admitted and enforced in the courts of England, of this state and of the other states of the union for a long number of years; and that there is no reason why effect to such a distinction should not be given in this case, the result being, as is stated, that the corporation has an unlimited right to take property and also an unlimited right to hold it as

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against any one but the state in its capacity of sovereign. There is undoubtedly a distinction between the right to take and the power to hold property under some circumstances, the only question being whether the legislature had such distinction in mind and meant to provide for it in the case in hand. It is said that an alien has the right to take property by purchase, but he cannot hold it as against the state. That is so. He takes, however, a defeasible title, good as to all but the sovereign power, which must take it upon office found or by escheat. (*Wright v. Saddler*, 20 N. Y. 320.)

In such case it is not exactly an accurate description of the alien's title to simply say that he can take but cannot hold. That is a contradiction in terms. If he take, he must hold, if for but a fractional part of a second of time. The expression is but a short one for the statement that he cannot hold, as against the claim of the state, where properly made and enforced. The same expression is used in the case of a corporation under the mortmain laws, that it can take but not hold, the meaning being that it cannot hold as against the claim for forfeiture when made by the next superior lord of the grantor of the lands. That the words lose all their meaning when wrenched from the circumstances under which they were used, and applied to corporations existing by virtue of the laws of this state, seems to me a plain proposition.

[The learned Judge here commented upon various cases cited by the appellants.]

In the case of *Vidal v. Girard's Executors* (2 How. [U. S.] 127), the trusts created by the will of Stephen Girard were held valid, and the court said that in such a case, if the corporation were incompetent to execute them, the heirs could not take advantage of such fact, as that could only be done by the state by *quo warranto* or other judicial proceeding. This is upon the ground that the *trust was a valid trust*, and if so, and the corporation, as such, had no power to execute it, the trust did not, for that reason, fail, but upon the failure of the corporation for lack of power, to execute it, a court of equity would appoint a new trustee. Of course, the heirs had no interest in the question when once the trust was declared valid, whether the corporation was exceeding its power in taking upon itself the execution of the trust or not. They had no title to or any further interest in the property. They stood, therefore, in respect to the corporation, as any other strangers. The case does not aid the appellant upon the matter under review.

The cases of the *Elevated Railroad* (70 N. Y., 327, 338) and *Moore v. Brooklyn, etc., Railroad* (108 id. 98, 104) are cited to show that none but the sovereign can take advantage of a forfeiture of the charter, and that must be in a direct proceeding against the corporation. The principle is undenied. But in a case like this it is no forfeiture that is being insisted upon. It is simply a question of title to the pro-

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erty, and, provided it has not been legally devised or bequeathed, it necessarily vests in the heir or next of kin.

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But it is said that where property is given to a corporation which has power to take or hold under some circumstances, the title vests in the corporation, for otherwise the state would never obtain the right to forfeit even the charter for a violation thereof. The argument is, the corporation would answer a claim to forfeit the charter by the fact that the charter precluded it from taking such property, and, therefore, as it could not, it had not done so. I do not see the force of the argument. The charter may preclude the rightful taking of the property by the corporation, and may prevent the legal title from vesting in it, but that has nothing to do with the fact that, nevertheless, the corporation has, as a physical act, taken the property and may be insisting upon its right to keep it as matter of law. In such case can there be any doubt that the corporation has taken and is holding the property as its own and in defiance of the charter, and that it may be punished by having its charter forfeited, although the rightful owner of the property may thereafter obtain his own? The fact that he does obtain it is no answer to the other fact that the corporation had taken it, nor is it any legal answer to the claim of forfeiture of the charter, on the part of the state, that it was unsuccessful in continuing to hold the property against the charter provisions.

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Although we never adopted or enacted the English statutes of mortmain, yet in this, as in other states, we have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise.

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The counsel claims, however, that a devise to a corporation vests the title in it, so far as the question of capacity is concerned, whenever it would in the case of a sale for a valuable consideration. Hence he says that the cases of sales above cited are decisive of this, if they be admitted as well decided. In the case of an executed sale, however, the question of *ultra vires*, as set forth in the modern cases, comes in play, and the question of a want of title in the corporation in such case would not be permitted to be raised by the grantor or his heirs, because it would be against justice and would accomplish a legal wrong. (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62.)

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The question of an executed gift without consideration by a donor, by an absolute delivery to a corporation without power to take, is also instanced, and the question is asked whether the title vests in such a case in the corporation so that the donor or his heirs could not recover it back, and if it do, the counsel asks where is the difference in the two cases. It is time enough to decide such a case when it arises. But it seems to me there is a decided difference. In the one case the gift is made *inter vivos* by the absolute owner, and it is made effectual as to him by a delivery. In such case it would seem that he stands in no

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position to ask the aid of the court to get him out of a situation into which he voluntarily entered with his eyes open, and the court might well say to him that he stood in no position to attack the right of his donee to property which he freely and absolutely gave it. As to his heirs it could be said that their ancestor had made a disposition of property which was absolutely his own in his life-time, and in such a way that he could not question its validity, and that as he could not, they succeeding only to his rights, were alike disabled.

In the case of a devise, however, the case is essentially different. The will does not take effect until the testator's death, and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee, but it vests instantly in the heir or next of kin; and the corporation claiming under the will asks the aid of the law to give the property to it, and in so doing it must show the authority it has to take. And if there were only a prohibition in words against *holding* the property, would the law not be doing a vain thing in handing it over to a corporation which by the very fact of holding would render itself liable to have its charter forfeited on that account? Would not the prohibition against holding be properly and necessarily construed as a prohibition against taking also?

Is not this an argument against the right of the corporation to *take*, if by *holding* it is thus rendered liable to such a penalty? And is it not an argument in favor of the construction of the language in the charter that the limitation upon the power to hold property is, under all the circumstances, a limitation upon the power to take any more than it can legally and properly hold?

[After referring to the fact that the legislature, subsequently to the death of Mrs. Fiske, passed an act which took away any limitation on the power of the university to hold property.]

However perfect may be the waiver in the act alluded to, of the right of the state to forfeit the charter of this university on account of any alleged violation thereof, such act can, of course, have no possible effect upon rights of property which vested at the death of Mrs. Fiske and before the passage of the act in question. (*White v. Howard*, 46 N. Y. 144.)

This will devises no real estate to Cornell University. . . . [The will] directs that the estate of the testatrix shall be converted into money or available securities by her executor as soon as it can be done, having in view the best interests of the estate. This direction to convert operated as an equitable conversion of the estate of the testatrix into money or available securities, and hence no real estate in other states has been devised by her to the university. . . .

Upon a review of the whole question as to the proper construction of the legislation, general and special, affecting this university, I am

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of the opinion that it had no power to take or hold any more real and personal property than \$3,000,000, in the aggregate.

*Second.* Coming to the conclusion I have, on the first branch of the case, it becomes necessary to examine the second and only remaining question, viz.: Does this property, if taken and held by the university, exceed the amount which by law it can hold?

[The court *held*, that the property of the university, at the time of the decease of Mrs. Fiske, amounted to more than "its permitted aggregate"; and that, under such circumstances, the university could not take the various legacies bequeathed to it by her will.]

*Judgment of General Term affirmed.*

All concur, except FINCH, J., taking no part.

CCC 1275, 1313

### CASE v. KELLY.

1890. 133 U. S. 21.<sup>1</sup>

APPEAL from the U. S. Circuit Court for the Eastern District of Wisconsin.

The plaintiff, Case, receiver of the Green Bay & Minnesota R. R. Co., was ordered by the Court (in a suit to foreclose a mortgage given by the R. R. Co.) to take possession of all the corporate property, and was authorized to bring suits in the name of the company. Case, as receiver, brought the present bill in equity, stating that he sues in behalf of the company and as receiver.

The allegations of the bill are, that the defendants Kelly, Ketchum and Hiles, who were officers of the railroad company during its period of construction, had procured numerous donations of land from citizens who were interested in the construction of the road, along its line, intended to be for the use and benefit of the railroad company, and to assist it in such construction. The fundamental allegation of the bill is, that these defendants, representing to the persons who made the donations that they were officers of the road, and soliciting these grants for the benefit of the road, took the conveyances to themselves individually; that they did this in a fraudulent manner, by making the grantors in the conveyances believe that they, as the officers of the company, could receive the conveyances for the benefit of the road; and that either the grantors did not really know to whom the conveyances were made, or were induced to believe that when made the grantees held the lands as a trust for the benefit of the road. These defendants not recognizing this trust, and the conveyances on their faces being merely conveyances to the individuals, either separately or collectively, to wit: to Ketchum, Kelly and Hiles, who now refuse to

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

except & corp<sup>s</sup> other than counties, inc<sup>d</sup> & corp<sup>s</sup> formed for scientific, literary or educational or hospital purp<sup>s</sup> cannot take under a will unless expressly authorized & stat. July 1890, c. 11, § 13

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incidentally contracted I gave a mtg of R2 to the Pres. & Bk. in the Pres's  
own name. An arose whether the trans. was gov'd by St. law. as 2 individuals.  
only Fed law as trans. & the Bk. - to whom the mtg had been paid  
Held - Fed law. "The taking of R2 security by the Pres. & Bk. in his individual name  
was in legal effect but the taking of security by the Natl Bk. 191 US 451, 8.

convey to the company or to admit its right to the lands, this suit is  
brought to have a declaration of the trust made by the court and a  
decree ordering conveyances by the defendants of the land to the  
corporation.

It is further alleged that the mortgage in process of foreclosure in  
the court under which Case is acting as receiver covered all the lands  
of the corporation, and would cover these lands if the title of the  
corporation in them was established.

Answers were filed, and evidence taken. Upon the hearing, the  
Circuit Court was of opinion that the aforesaid conveyances were made  
by the grantors and received by the defendants as contributions to the  
railroad company to aid in the construction of the road. The Court  
was also of opinion that the company could only receive and hold lands  
for the necessary purposes of the road. The decision was, that plaintiff  
was entitled to recover the title and possession of all such lands as are  
required by the company for necessary railroad purposes (such as right  
of way, depots, &c.); and that the bill, as to all other portions of the  
land described therein, should be dismissed.

Walter C. Larned and Herbert M. Turner, for appellant.

George H. Noyes, for Hiles, appellee.

MILLER, J. [After holding that the company had no authority to  
receive an indefinite quantity of lands, whether by purchase or gift, to  
be converted into money or held for any other purposes than those  
mentioned in the act of incorporation]

It is next objected to the principle adopted by the court that the  
limitation upon the power of the corporation to receive land is one  
which concerns the State alone, and the title to such lands in a cor-  
poration can only be defeated by a proceeding in the nature of a *quo*  
*warranto* on behalf of the State. The case of *National Bank v.*  
*Matthews*, 98 U. S. 621, is strenuously relied on to support this view.  
We need not stop here to inquire whether this company can hold title  
to lands, which it is impliedly forbidden to do by its charter, because  
the case before us is not one in which the title to the lands in question  
has ever been vested in the railroad company, or attempted to be so  
vested. The railroad company is plaintiff in this action, and is seeking  
to obtain the title to such lands. It has no authority by the statute to  
receive such title and to own such lands, and the question here is, not  
whether the courts would deprive it of such lands if they had been con-  
veyed to it, but whether they will aid it to violate the law and obtain a  
title which it has no power to hold. We think the questions are very  
different ones, and that while a court might hesitate to declare the title  
to lands received already, and in the possession and ownership of the  
company, void on the principle that they had no authority to take such  
lands, it is very clear that it will not make itself the active agent in  
behalf of the company in violating the law and enabling the company  
to do that which the law forbids.

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We are urged to consider that if this decree is affirmed dismissing the bill of the railroad company, the defendants will be left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is, that such question cannot be raised by the plaintiff in this case, because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy.

The decree of the Circuit Court is

*Affirmed.*

MR. CHIEF JUSTICE FULLER did not hear this case and took no part in its decision.

## 2034 R 561 1/2 HUBBARD v. WORCESTER ART MUSEUM.

1907. 194 Massachusetts, 280.

KNOWLTON, C. J. This is a petition brought by the heirs of Stephen Salisbury, late of Worcester, deceased, for leave to file an information in the nature of a *quo warranto* against the respondent, under the R. L. c. 192, §§ 6-13. The Worcester Art Museum is a corporation, established under the provisions of the Pub. Sts. c. 115 (R. L. c. 125), "for the purpose," as set forth in its certificate of incorporation, "of founding an institution for the promotion of art and art education in said Worcester; erecting and maintaining buildings for the preservation and exhibition of works and objects of art; making and exhibiting collections of such works, and providing instruction in the industrial, liberal, and fine arts; for holding real and personal estate in the furtherance of this purpose; and for the holding and administering funds acquired by the corporation for these and kindred objects in accordance with the will of the donors. All of said property and funds of the corporation, however, are to be held solely in trust for the benefit of all the people of the city of Worcester." By the will of Mr. Salisbury this corporation is made his residuary legatee, and if the intention of the testator is carried out, it will receive, under the will, real and personal estate amounting in value to between \$2,000,000 and \$3,500,000. By the R. L. c. 125, § 8, such corporations are authorized to "hold real and personal estate to an amount not exceeding one million five hundred thousand dollars." By the St. 1906, c. 312, enacted after the probate of the will, the right of this respondent to hold real and personal estate was enlarged to an amount not exceeding \$5,000,000. The petitioners contend that, by reason of the limitation in the statute, the gift was void; that, as heirs at law of the

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testator, their rights in this part of his estate became vested on the probate of the will; that the St. 1906 is prospective in its operation, and does not affect the right of the respondent to hold property under this will, and that, if it were construed as applying to property devised by this will, it would be unconstitutional and void.

The statute under which the petition is brought has been considered in *Goddard v. Smithett*, 3 Gray, 116, in *Hartnett v. Plumbers' Supply Association*, 169 Mass. 229, and in other cases. We will assume in favor of the petitioners, without deciding, that if they were right in their view of the questions of substantive law involved, it would be available to give them the remedy which they seek. We come directly to the effect of the residuary clause in the will.

The attack upon its validity may be considered from two points of view: first, in reference to the rights of testators, as against their heirs, to dispose of their property for charitable or other purposes; secondly, in reference to the provisions of the law giving this kind of corporations a right to hold property to an amount not exceeding a certain sum.

From the first point of view this gift is perfect and complete. Except for the protection of the statutory rights of a husband or wife, the power of a testator in this Commonwealth to dispose of his estate by a will is unlimited. There is nothing in our law to restrain one from giving free course to his charitable inclinations, up to the last moment of his possession of a sound, disposing mind. Making charitable gifts in this Commonwealth is not against public policy, and we have no legislation, such as has long existed in England and in New York and some of the other American states, putting obstacles in the way of such testamentary acts. The only ground of objection to this part of the will is not from the point of view of the testator or of his heirs, but on account of the provision of the statute regulating the rights of corporations as to the holding of property. We must, therefore, determine the meaning and effect of this statute on which the petitioners rely.

They contend that it is by implication an absolute prohibition against the holding, at any time, in any form, for any purpose, of a greater amount of property than that stated, and that any attempt of a corporation to hold more, or of any person to put more into the ownership of a corporation, is illegal and absolutely void. The respondent contends that this implied limitation of the right to hold is made on grounds of public policy; that it is a provision only in favor of the State, which the State may enforce or not, as it chooses; that grants or devises in excess of the amounts stated are not void, but only voidable; that third persons cannot question the validity of such grants or devises, but that they are legal so long as the State leaves them undisturbed, and that the State may at any time, by a legislative act or in some other proper way, completely waive its right of enforcement.

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In interpreting the act the history of earlier kindred provisions may be helpful. At common law, corporations were authorized to acquire and hold both real and personal property without limit. *In re McGraw's estate*, 111 N. Y. 66, 84. "The creation of a corporation gives to it, amongst other powers, as incident to its existence, and without any express grant of such powers, that of buying and selling." *Bank v. Poitiaux*, 3 Rand. 136. "A corporation has, from its nature, a right to purchase lands, though the charter contains no license to that purpose." *Leazure v. Hillegas*, 7 S. & R. 313. See also *Page v. Heineberg*, 40 Vt. 81; *Mallett v. Simpson*, 94 N. C. 37, 41.

Under the feudal system, when land was given to a corporation, the chief lords of whom the land was held, and the king as ultimate chief lord, lost their chances of escheat, and various other rights and incidents of military tenure. During the Middle Ages, the accumulation of land in the ecclesiastical corporations was so great as to be thought a national grievance. Hence the English mortmain acts, which go back for their origin to Magna Charta, St. 9 Hen. III, c. 36, and which have continued with various modifications to this day. See 7 Edw. I, c. 2; 15 Rich. II, c. 5; Shelford on Mortmain, 2, 6, 8, 16, 25, 34, 39, 809, 812; Tyssen on Charitable Bequests, 2, 383. Under these acts the alienations were not void, so as to let in the grantors and their heirs; but they merely operated as a forfeiture, which gave a right to the mesne lord and the king to enter after due inquest. This right to enter was often waived by a license in mortmain. See citations above, and Tyssen on Charitable Bequests, 383; St. 7 & 8 Will. III, c. 37. In form these licenses commonly authorized a holding of property "not exceeding" a certain value. In later years this authority sometimes has been inserted in the charter, and this limited power of purchase has, it is said, been exceeded by almost all corporations. Shelford on Mortmain, 55. See also pages 10, 44, 49, 56, 891; Tyssen on Charitable Bequests, 393, 394, 396.

Another act, St. 9 Geo. II, c. 36, which is usually called "The Mortmain Act," but is called by Tyssen the "Georgian Mortmain Act," is of a very different nature. One of its purposes, as declared in the preamble, is to avoid "improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs." Considered in reference to its purposes, it is not properly called a mortmain act. It applies only to gifts for charitable uses; and under it all such gifts, unless made as the statute allows, are absolutely void.

We never have had any real mortmain acts in Massachusetts. The nearest approach to one was the Prov. St. 1754-55, c. 12; 3 Prov. Laws (State ed.), 778. This made deacons a corporation to take gifts for charitable purposes, limited the grants to such as would produce an income not exceeding three hundred pounds a year, and provided that they should be made by deed, three months before death, and that all

bequests, devises, or later grants should be void. This statute related only to gifts to deacons, and was repealed by St. 1785, c. 51 (February 20, 1786), which reenacted a part of the law, but omitted the provision that gifts not authorized by the act should be void. *Bartlet v. King*, 12 Mass. 537, 545. See R. L. c. 37, § 1.

The significance of this reference to English law and to our legislation is, first, that, except for this short period, we have never had in Massachusetts any legislation prohibiting charitable gifts to trustees or corporations, or providing that any kind of conveyances, devises, or bequests to corporations shall be void. On the other hand, the policy of the Commonwealth, as expressed both by legislation and the decisions of its courts, has been exceedingly liberal to testators and public charities. *Sanderson v. White*, 18 Pick. 328, 333, 334; *American Academy v. Harvard College*, 12 Gray, 582, 595, 596; *Sultonstall v. Sanders*, 11 Allen, 446; *Jackson v. Phillips*, 14 Allen, 539, 550. Secondly, the implied limitations upon the power of corporations to hold property, which appear in numerous enactments, have been made, not in the interest of grantors or devisors or their heirs, but in the interest of the State, on considerations of public policy. The general form of these limitations, which appears in the statute before us, and with slight variations in special charters (a list of which, two hundred and seventy-four in number, granted in this State before 1850, has been furnished us through the industry of counsel) corresponds with the form of licenses granted by the Crown in England under the old mortmain acts, and sometimes embodied in charters granted by Parliament. Under these English acts, grants or devises to a corporation to hold property without a license, or in excess of the amount licensed, were not void, but only voidable by the mesne lord or the king, upon entry, after inquest according to law. In view of the close relations between Massachusetts and the mother country in early times, this justifies an argument, of considerable strength, that the implied limitations in our statutes were intended to have no greater force than the old mortmain acts of England, as distinguished from the Georgian mortmain act.

We start with the inherent right, already referred to, of every corporation to take and hold property at common law, by virtue of the act of its creation. This right is recognized in our statutes by implication, without express mention. R. L. c. 109, §§ 4-6. What force is to be given to the words, "may hold real and personal estate to an amount not exceeding one million five hundred thousand dollars"? The respondent contends that their meaning is as if words were added as follows: "and beyond that amount it shall have no right as against the Commonwealth; and the Commonwealth may take proper measures, through action of the Attorney-General or otherwise, to prevent or terminate such larger holding." According to the argument, a taking and holding by a corporation, above the prescribed amount, is under its inherent right. As between it and the State as the guardian

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of the public interest, a provision as to amount is made, which does not affect its right as to third persons. As to the general legality of the holding, except when the State chooses to enforce the law for its own benefit, the condition is similar to that resulting from a statutory provision which is merely directory. It is not very unlike the old law as to conveyances to aliens. Such conveyances, whether by grant or devise, were good against every one but the State, and could be set aside only after office found. *Fox v. Southack*, 12 Mass. 143; *Waugh v. Riley*, 8 Met. 290; *Judd v. Lawrence*, 1 Cush. 531; *Kershaw v. Kelsey*, 100 Mass. 561.

That this is the effect of such limitations in statutes of this kind where the title of the corporation is under a grant, as distinguished from a devise, seems to be the universal rule. *Vidal v. Girard*, 2 How. 127, 191; *Runyan v. Coster*, 14 Pet. 122; *National Bank v. Matthews*, 98 U. S. 621; *Cowell v. Springs Co.*, 100 U. S. 55, 60; *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622; *National Bank v. Whitney*, 103 U. S. 99; *Fritts v. Palmer*, 132 U. S. 282; *Leazure v. Hillegas*, 7 S. & R. 313; *Chambers v. St. Louis*, 29 Mo. 543; *Bank v. Poitiaux*, 3 Rand. (Va.) 136; *Fayette Land Co. v. Louisville & Nashville Railroad*, 93 Va. 274; *Mallett v. Simpson*, 94 N. C. 37; *Gilbert v. Hole*, 2 So. Dak. 164; *Barrow v. Nashville & Charlotte Turnpike Co.*, 9 Humph. 304; *Hough v. Cook County Land Co.*, 73 Ill. 23; *Alexander v. Tolleston Club*, 110 Ill. 65; *Barnes v. Suddard*, 117 Ill. 237; *Hamsher v. Hamsher*, 132 Ill. 273; *Baker v. Neff*, 73 Ind. 68, 70. This is a fair deduction from the decisions in this Commonwealth. *Heard v. Talbot*, 7 Gray, 113; *Commonwealth v. Wilder*, 127 Mass. 1, 6; *Davis v. Old Colony Railroad*, 131 Mass. 258, 273; *West Springfield v. West Springfield Aqueduct Co.*, 167 Mass. 128; *Slater Woollen Co. v. Lamb*, 143 Mass. 420; *Prescott National Bank v. Butler*, 157 Mass. 548; *Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147; *National Pemberton Bank v. Porter*, 125 Mass. 333; *Atlas National Bank v. Savery*, 127 Mass. 75; *Bowditch v. New England Ins. Co.*, 141 Mass. 292; *Chaffee v. Middlesex Railroad*, 146 Mass. 224.

The counsel for one of the petitioners says in his brief, "It is fully conceded at the outset that where a corporation takes and holds property by conveyance, or by executed gift *inter vivos*, contrary to its charter rights, no one but the State can complain. This is settled by a practically unbroken line of decisions in all the states," etc.

But if the statute were a prohibition that renders the holding utterly void, and the taking also void, as is argued in the opinion in *In re McGraw's estate*, 111 N. Y. 66, anybody interested could take advantage of the violation of law, unless he was precluded by estoppel. Most of the cases which we have cited do not put their decision on the ground of estoppel. Often the question might arise when there was no estoppel. The ground on which most of the cases go is that the implication is not an absolute prohibition, but only a condition affecting the rights of the corporation as between it and the State. If

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the holding were an illegality which was utterly void, the condition would be the same whether the taking was by grant or devise, and a variety of unfortunate consequences might follow. The property might greatly increase in value after its acquisition, as was the case in *Evangelical Baptist Society v. Boston*, 192 Mass. 412. In that case, although the property of the corporation largely exceeded in value the amount authorized by the statute, there was no intimation that the holding was illegal, so long as the State did not interfere. See also *Humbert v. Trinity Church*, 24 Wend. 587, 605. As to all interests of private persons, in the absence of interference by the State, the cases generally treat titles to property held by corporations in excess of the specially authorized amounts as good. They allow the corporations to give good titles to purchasers of such property.

Some judges, in holding that such titles cannot be taken under wills, endeavor to found a distinction upon the executed character of a title by grant, and suggest that a devise or bequest is executory. It seems to us that there is no good reason for the distinction. When a will is proved and allowed, it takes effect immediately to pass all property affected by it. The provision in the law against large holdings by corporations has no relation to the probate of the will. The act of the testator in executing the will is confirmed and given effect as a complete and executed disposition of the property, by the allowance of the will. In this respect a recorded will does not materially differ from a delivered deed. The heirs at law are bound by one as well as by the other.

The decisions upon the precise point at issue are conflicting. In *Jones v. Habersham*, 107 U. S. 174, a case similar to that now before us, it was held by the court, in an opinion by Mr. Justice Gray, that "restrictions imposed by the charter of a corporation upon the amount of property that it may hold, cannot be taken advantage of collaterally by private persons." In the same case in the Circuit Court the question had been considered previously, and the same result was reached, in an opinion by Mr. Justice Bradley of the Supreme Court of the United States, which is found in 3 Woods, 443, 475. The same rule is established in Maryland. *Hanson v. Little Sisters of the Poor*, 79 Md. 434; *In re Stickney's will*, 85 Md. 79, 104. *DeCamp v. Dobbins*, 2 Stew. (N. J.) 36, 40, was decided by the Chancellor on this ground. The decree was affirmed on another ground in the Court of Errors and Appeals, 4 Stew. (N. J.) 671, 690, in an opinion by Beasley, C. J., which contains a dictum disapproving of the view of the Chancellor. In *Farrington v. Putnam*, 90 Maine, 405, the court, in a very elaborate opinion, in a case identical in its leading features with that now before us, held that the gift was good. The same doctrine is stated in *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. Rep. 796, 801; s. c., 134 Fed. Rep. 513, 527. It is also stated in text books. Beach, Corp. (Purdy's ed.) § 825; Thompson, Corp. §§ 5795, 5797.

The leading case which presents the opposite view is *In re McGraw's*

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McGraw ca  
based on NY  
policy to Corp

estate, 111 N. Y. 66. Although the decision necessarily puts a construction upon a statute of that State, this construction seems to be materially affected by the policy of New York in reference to charities. Said Judge Peckham, who delivered the opinion, "We have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise." In *Chamberlain v. Chamberlain*, 43 N. Y. 424, the court refers to the prohibition of devises, and to the N. Y. St. 1860, c. 360, still in force, which makes void all bequests or devises to charity in excess of one half the testator's property, where he leaves relatives. Other statutes have been passed, limiting the amount that can be devised to certain corporations by one testator, forbidding a devise or bequest to charities, by a person leaving relatives, of more than one fourth of his estate, and making void such gifts where the will was executed within two months before the death of the testator. Gen. Laws of N. Y. 1901 (Heyd. ed.), 4885, 4891, 4892. The policy of that State in regard to charities has been very unfavorable. See *Allen v. Stevens*, 161 N. Y. 122, 139, 140; *People v. Powers*, 147 N. Y. 104; *Fosdick v. Hempstead*, 125 N. Y. 581.

The doctrine of the New York court is stated as the law in *Davidson College v. Chambers*, 3 Jones Eq. 253, and adopted in *Wood v. Hammond*, 16 R. I. 98, 115, and *House of Mercy v. Davidson*, 90 Tex. 529. In the case in North Carolina the decision was by two of the three judges of the court, the Chief Justice giving an able dissenting opinion. The courts in Kentucky and Tennessee have expressed approval of the McGraw case in New York, but in terms that do not leave the grounds of their decisions entirely clear. *Cromie v. Louisville Orphans' Home Society*, 3 Bush, 365, 383; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 686. In reference to supposed errors in the opinion in the last case, see Pritchard on Wills, § 153, note, and *Farrington v. Putnam*, 90 Maine, 405, 433.

In the construction of our statute, when the question arises whether a different rule shall be established in regard to the taking and holding by a corporation under a will from that which is universally laid down in regard to a holding under a deed, we are much influenced by the policy of our law as to devises and bequests for charitable purposes. We are of opinion that, under the R. L. c. 125, § 8, a gift to a corporation under a will, to an amount in excess of the sum specially authorized, should be held no less valid than a similar acquisition of title under a deed. It is good as against every one but the Commonwealth. It follows that the St. 1906, c. 312, operated as a waiver of the Commonwealth's right to terminate the holding, and a legislative declaration of the entire validity of the provision in the will.

If we are wrong in this conclusion, the petition must be dismissed on an independent ground. The gift was to a public charity. The purposes of the Worcester Art Museum, as set forth in the agreement

for its organization from which we have quoted, show the charitable uses to which all property held by it must be put. It is all held "solely in trust, for the benefit of all the people of the city of Worcester." We have no doubt that the property was given under the testator's will with a general charitable intent, with which the Worcester Art Museum, as a corporation, had no other connection than as an instrument to carry out the general purpose of the testator. In other words, the gift was not to the Worcester Art Museum as a corporation, apart from the charitable work in which it was engaged, nor on account of anything essential or peculiar in its performance of the charitable work described in its instrument of organization. The general charitable purpose was predominant in the mind of the testator, and not a desire to give to a particular corporation. The charitable purpose may be implied in the name or object of the devisee. *Winslow v. Cummings*, 3 Cush. 358; *Bliss v. American Bible Society*, 2 Allen, 334; *Incorporated Society v. Richards*, 1 Dr. & War. 258, 331. The object of the devisee, as a legally established public charity, was well known to the testator. To state the same proposition in other language, an implication to create a public charity may arise "from the character of the body to which the gift is made, or from publicly avowed purposes of its organization and action." *Old South Society v. Crocker*, 119 Mass. 1, 24; *Stratton v. Physio-Medical College*, 149 Mass. 505, 508. In such a case, if for any reason the donee named is incapable of executing the trust, the court will not allow the gift to fail for want of a donee. *Fellows v. Miner*, 119 Mass. 541; *Codman v. Brigham*, 187 Mass. 309; *Osgood v. Rogers*, 186 Mass. 238; *Bliss v. American Bible Society*, 2 Allen, 334; *Sherman v. Congregational Home Missionary Society*, 176 Mass. 349; *Winslow v. Cummings*, 3 Cush. 358; *Attorney-General v. Stephens*, 3 Myl. & K. 347; *Hayter v. Trego*, 5 Russ. 113; *Loscombe v. Wintringham*, 13 Beav. 87; *Swasey v. American Bible Society*, 57 Maine, 523; *Almy v. Jones*, 17 R. I. 265.

If the corporation, at the time of the probate of the will, was incapable of taking the property and carrying out the general charitable intent of the testator, the court, applying the doctrine of *cy pres*, would appoint a trustee to act in its place. Inasmuch as the Legislature, by the St. 1906, c. 312, has removed the only ground of its disability, a direction to turn over the property to the corporation would accomplish perfectly the purpose of the testator. *Baker v. Clarke Institution for Deaf Mutes*, 110 Mass. 88.

In no view of the case have the petitioners any private right or interest which has been injured by the respondent, such as brings them within the provisions of R. L. c. 192, § 6.

12/29/1906 C. J.

*Petition dismissed.*



(D) *Liability of Stockholders or Officers.*

## MEDILL v. COLLIER.

1886. 18 Ohio St. 599.

If deposited \$  
 at a bank on authority  
 to take. He seeks  
 shh on the prom  
 casso to pay him

DAY, J. There is no controversy but that the defendants, while doing business under the name of the Citizens' Bank of Steubenville, by their agents, received of the plaintiff the amount of money sued for, and promised to pay him the same, as stipulated in the instrument mentioned in the petition. These facts, as well as the averment in the petition that they refused, on demand, to pay the plaintiff such money due him, the defendants do not deny in their answers; but they severally deny that they are jointly or individually indebted to the plaintiff therefor.

They claim that the transaction was wholly between the plaintiff and the Citizens' Bank of Steubenville as an incorporated institution; and that, therefore, they are not responsible therefor.

The question for our determination, then, is, whether, upon the showing in this record, the plaintiff was entitled to a judgment against any or all of the defendants in their individual capacity.

This involves the consideration of at least one, possibly two questions: first, whether the Citizens' Bank of Steubenville was a corporation with power to make the contract mentioned in the petition; and, if not, secondly, were the defendants individually liable to the plaintiff for the money in controversy. . . .

All this business with the plaintiff, done in the name of the bank, the corporation was forbidden to transact, and therefore had no power to do, or to authorize its officers to do. Indeed, it had no power to carry on the business in which its officers were engaged, or to engage in the business for which it was organized. It was a corporate body, it is true, but lifeless for all the purposes of its creation. It could be animated with banking powers only by complying with the requisition of section 44.

The contract with the plaintiff, then, as to the corporation, the defendants must concede, was void. Ang. & Ames on Corp., sec. 256.

A banking business was carried on in the corporate name by the defendants, and it is claimed that, since they had neither the right nor power so to do as a corporation, but possessed both as partners, the law will presume that they carried on the business in their lawful right, and will hold them responsible as partners. On the other hand, it is claimed that the defendants were duly incorporated, and that, having acted in good faith in that capacity in their transactions with the plaintiff, they are shielded from private liability. And this brings us to the inquiry, whether the defendants, or any of them, are liable in their individual capacity.

It is not disputed but that the officers and agents of corporations are protected from private liability while acting within the scope of the corporate powers; but how far such protection is extended when they transcend the corporate authority is not clearly defined. That in such cases a personal liability exists, seems to be recognized, in many cases, in this and other states. *Lawler v. Walker*, 18 Ohio, 157; *Kearney v. Buttles*, 1 Ohio St. 362; *Salem Bank v. Gloucester Bank*, 17 Mass. 29; *Lawler v. Burt*, 7 Ohio St. 353; *Fry v. Noble*, 7 Cush. 188; *Hood v. The New York & New Haven R. R. Co.*, 22 Conn. 502.

It is well settled that they who occasion injury to others by the fraudulent use of corporate powers, are personally liable in damages therefor. *Bartholomew v. Bentley*, 15 Ohio, 659; *Bartholomew v. Bentley*, 1 Ohio St. 37; *Vose v. Grant*, 15 Mass. 519; *Trowbridge v. Scudder*, 11 Cush. 83.

It was held, in the case of *Fry v. Noble* (7 Cush. 188), that the stockholders in a defectively organized corporation, and which had transacted business under such organization, do not thereby become partners in such business, for the reason that innocent parties might thereby become involved in liabilities to which they never gave their assent, or which were not embraced in their stock subscriptions. But it was held in that case that an agent, acting in the name of such unorganized corporation, would be personally liable upon a "familiar principle of law, that a person who acts as agent without authority, or without a principal, is himself regarded as a principal, and has all the rights, and is subject to all the liabilities, of a principal."

It is clear that the persons who carried on banking business in the name of the Citizens' Bank of Steubenville, had no authority from the corporation of that name for so doing. So far were they from having such authority, that some of my brethren hold that, in legal effect, there was no corporation for doing a banking business in existence, in this case. If so, the persons who carried on such business as agents, without a principal, did so for themselves, and are personally responsible. Story on Agency, sec. 280; 2 Kent's Com. 630, sec. 41; Ang. & Ames on Corp., sec. 303. { Lib on suffd in - ang }

While it is true that the defendants acted in good faith, as the record shows, and doubtless believed themselves to be protected from private liability under corporate privileges, it is equally clear that the plaintiff had no information as to whether they were doing business as a corporation, or as private bankers. He seems to have trusted them in the latter capacity. At all events, he did not know that they had failed to comply with the requisitions of the statute, and that, therefore, the certificate he received for his money was, to say the least, of doubtful availability against the corporation.

By reason of the mistake or negligence of the defendants in not depositing stocks with the auditor, the receiving the deposit of the plaintiff by them as a corporate bank was forbidden by law; and whether

a | the law would afford any remedy in favor of the plaintiff against the corporation, upon a contract, express or implied, made on its part in violation of law, may well be doubted, both upon principle and authority. As the corporation was prohibited from receiving the deposit, there is the same reason for holding the implied as well as the express promise, void. Clearly the plaintiff would have no remedy against the corporation, unless he could bring to his aid the doctrine of estoppel, where the transaction is forbidden, as may be done where it is merely unauthorized. Although the court do not deem it necessary to decide this point, the following authorities tend to show that the plaintiff is remediless against the corporation: Ang. & Ames on Corporations, secs. 256, 265, and note 7; 22 Conn. 502; 8 Gill & Johns. 248; 8 Barb. 233; 36 Barb. 210; 22 N. Y. 258; 3 Comst. 19.

Whether the plaintiff could avail himself of the aid of the doctrine of estoppel against the corporation or not, the defendants are not in a position to insist on his right in that respect, to exculpate themselves from any liability against them, arising out of a want of remedy by the plaintiff against the company.

The plaintiff has elected not to experiment upon a doubtful right against the company, but has resorted to those whom he trusted, and who received his money. They admit that they received his money, and that it remains unpaid. Upon the just principles of the common law applicable to individuals, they are personally liable to pay it, unless they are excused or protected by the intervention of some recognized rule of law. They interpose the privilege corporators enjoy, shielding them from private responsibility for debts incurred in their corporate capacity. But the record discloses that the defendants not only lacked the power, but were positively forbidden to receive the money of the plaintiff, in the corporate capacity claimed by them. To suffer this to be available to the defendants, would render that legal which is prohibited by law—it would annul the statute; nay, it would be giving to corporators, who carry on business without authority and in violation of law, rights equal with those who are careful to observe its wholesome provisions. The well-established principles of legal justice must be “reconstructed,” before they will suffer such a defence to avail against the payment of a just debt.

A plain distinction exists between acts simply without authority, and those which are forbidden by law; the former may be without right; the latter can be done not only without right, but only in the commission of a positive wrong. This case belongs to the latter class. Nor was this a single instance. The record shows that the entire business, carried on in the corporate name, was done in violation of law. It is not, therefore, necessary for us to determine in this case whether those acting for a corporation, duly organized and authorized to do business, are personally liable for every obligation incurred in violation of its charter, or of the law of the state; much

less is it necessary to consider whether they are so liable when they simply transcend the corporate authority.

Without undertaking to determine how far the principle may be extended, it is decisive of this case to hold as we do, that where the entire business, carried on by persons in the name of a corporation, is such as the corporation is prohibited by law from doing, they cannot interpose the corporate privileges between them and the liabilities which the law imposes upon individuals in the transaction of similar business without the use of the corporate name.

It by no means follows that all the subscribers to the stock of the corporation are personally responsible for the debts contracted in the transaction of such business; for that is not the legal import of the subscription contract, and the business may be thus carried on without the knowledge or participation of all the stockholders. The law would imply that they alone assumed the liabilities of such business who engaged in it, or who authorized or sanctioned it.

Applying this principle to the facts as disclosed by the record in this case, it cannot be doubted but that the business, carried on in the name of the corporation by some of the defendants, was fully understood, authorized, and sanctioned by all.

The transaction with the plaintiff was but a part of an entire business, and must, therefore, have been as fully authorized as any business done in the name of the bank. It was carried on through a series of years; and during its progress the stockholders elected directors to carry on this very business, as it must be presumed, since it was the only business it did, or attempted to do.

It follows that the judgment of the court of common pleas must be reversed. But, as it is insisted by counsel for the defendants that there are facts rendered material to some of the defendants under the conclusion to which we have come, not shown by the record; and as it is left doubtful by the record whether some of the defendants were members of the association when the indebtedness to the plaintiff was incurred; and as it is desired to bring in the representatives of deceased parties and make them parties to the record; on motion of the defendants, the cause is remanded to the court of common pleas for further proceedings, trial, and judgment.

SCOTT, C. J., and WHITE, WELCH, and BRINKERHOFF, JJ., concurred.

*If A knew that C was Cg for M (the Corp). he can't hold them except on implied wr. auth. But if Co had n auth he knew it had not i.e. knew that C was n.r. he shd n recover vs agts since his C & M was worthless.*

*Cf. 52 D.T. 981; 22 Kane 405; 25 F.812; 106 D.T. 782.5 (2d 1908)*

*Direct purchase  
of stock, p. 1, 1st.*

*sp. both knew.*

*Supp. C. no lead in bank address W.T. (Pullman)  
As not liable for acts implied as C & M no  
liab. n.r.*

*No doctrine supplied by law. Ch. p.*

97 RICHARDSON v. WILLIAMSON.

1871. L. R. 6 Q. B. 276.

DECLARATION on the common money counts.

Plea: never indebted. Issue joined.

At the trial before Hannen, J., at the London sittings after Easter term, 1870, it appeared that the action was brought to recover 50*l.*, the balance of 70*l.*, which the plaintiff had lent to The Imperial Permanent Benefit Building Society, on the deposit of which she received the following document, stamped as a receipt, signed by the two defendants, who were directors of the society:—

“Imperial Permanent Benefit Building Society,

“London, 17th June, 1867.

“This is to certify that Mrs. A. E. Richardson, of, &c., has this day deposited the sum of 70*l.* with the Imperial Permanent Benefit Building Society for a period of three months certain, upon which interest at the rate of 5*l.* per cent per annum will be allowed.

“J. W. WILLIAMSON, }  
“C. L. LAWSON, } *Directors.*

“WM. RICHARDSON, *Secretary.*

“Memorandum.—The above deposit may be withdrawn at any time subsequent to 17th September, 1867, upon receipt of fourteen days' previous notice of such intended withdrawal.”

The plaintiff withdrew 20*l.* on the 7th of May, 1868, and after giving notice to withdraw the rest, she was unable to obtain it; and a correspondence ensued, in which the defendants said there were plenty of funds, but not immediately available. Being unable to get her money, the plaintiff took legal advice, and was advised that she had no remedy against the society, which was established under the Benefit Building Societies Act (6 & 7 Wm. 4, c. 42), and the rules of the society containing no power to borrow money; she accordingly brought the present action, seeking to make the defendants personally liable.

On these facts a verdict was taken by consent for the plaintiff for the amount claimed, with interest, with leave to move to enter a verdict for the defendants; the court to be at liberty to draw inferences of fact, and to amend the declaration in any way they might think proper.

A rule was accordingly obtained to enter a verdict for the defendants, on the ground that the defendants were not personally liable to repay the sum sued for, or to be sued in this form of action.

COCKBURN, C. J. The defendants as directors appear to have proceeded to borrow money on behalf of the society without ascertaining whether they had power to do so, and they apply to the public to advance money on the faith of the solvency and liability of the society. It turns out that they had no authority to do this, the society having no power to borrow money. It cannot be supposed

that the plaintiff on lending money to the society did so with the knowledge that the society was not authorized to borrow; and it was not till she wanted her money back that she ascertained the real position of affairs, and is met by the defence that the society is not liable. Fortunately, there is a mode by which persons acting as the defendants have done can be reached, and the loss thrown on the right parties. By the law of England, persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for damages for the breach of an implied warranty of authority. This was decided in *Collen v. Wright*,<sup>1</sup> and other cases; and the necessary amendment may be made in the case. Then I think upon the facts the inference is, that the defendants do represent upon this instrument that they are authorized on behalf of the society to borrow money, and that the society will be liable on this contract of loan. It is quite true, as the defendants' counsel contended, that the plaintiff intended to deal with the society; and the ground of the amended cause of action is that the defendants induced her to deal with the society by representing they had authority when they had not.

BLACKBURN, J. I am of the same opinion. It appears that the plaintiff on advancing her money received a certificate, signed by two directors, that she had deposited the money with the society for three months, and that after that it would be repaid with interest after fourteen days' notice. I think it clear that the defendants, the two directors who signed this certificate, did by that represent that they had authority to borrow the money on behalf of the society, and that the society would be bound to repay it on proper demand. As they had no such authority, it follows, on the principle of the decision in *Collen v. Wright*,<sup>1</sup> that the plaintiff is entitled to recover from the defendants the damages she has suffered from not being able to sue the society, on showing that the defendants professed to be able to bind the society. But as the declaration only contains the common money counts, it will be necessary that an amendment should be made. Had the society been insolvent the damages would have been possibly nil. The correspondence shows that the society has ample funds, and, therefore, the damages will be the same as what she would have recovered from the society had it been liable, that is, the amount of her loan and interest.

MELLOR, J., concurred.

HANNEN, J. I am of the same opinion. Assuming the amendment to have been made, the cause of action would have been proved by showing that the plaintiff had been induced to alter her position and part with her money by the defendants, in effect, representing that they had authority on behalf of the society to give her a binding certificate of indebtedness.

*Rule discharged.*

<sup>1</sup> 7 E. & B. 301; 26 L. J. (Q. B.) 147; 8 E. & B. 647; 27 L. J. (Q. B.) 215.

Cal Cases Collectors of Unp'd & Subscr. / Cf 872  
134/861; 6715g  
110/221

## BOOK III.

SOME RIGHTS AND LIABILITIES OF HUMAN BEINGS  
ARISING OUT OF THEIR RELATIONS  
TO CORPORATIONS.

## CHAPTER I.

## PROMOTERS.

(A) Subscriptions to Stock of a Corporation to be formed.

Condit<sup>o</sup> Subscr<sup>o</sup> 870.2 Reg 529, 605 (1890)  
Appl<sup>o</sup> for shares '06 I much 201

As ATHOL MUSIC HALL CO. v. CAREY, 1875.  
Subscr<sup>o</sup> was an offer wh<sup>o</sup> Co when incorp<sup>d</sup> & accept  
1875. 116 Massachusetts, 471.

CONTRACT on the following agreement:—

"We, the undersigned, severally promise and agree to and with each other that we will associate ourselves into a corporation, the name whereof shall be determined by the members thereof, and pay to the treasurer of said corporation the amount of the several shares set against our respective names, for the purpose of purchasing the homestead of Washington H. Amsden, in Athol, on Main Street, and erecting a public hall thereon. The amount of the capital stock of said corporation to be not less than twenty thousand dollars.

Names.	No. of shares.	Amount.
John Carey,	One,	\$100."

The declaration alleged that the defendant entered into and signed the above contract (a copy whereof was annexed), and thereby agreed, in consideration of other parties signing similar agreements, to pay to the treasurer of the Athol Music Hall Company the sum of \$100, for one share in the capital stock of said corporation when it should be organized. It then alleged the organization, the purchase of the homestead of Amsden, the building of a public hall thereon, a demand for the \$100, readiness to deliver the stock, and the refusal of the defendant to pay.

At the trial in the Central District Court of Worcester, the defendant asked the judge to rule that the action could not be maintained on the pleadings. This request was refused.

There was evidence tending to show that in December, 1870, the defendant signed the agreement declared upon; that the act of incor-

poration was passed on March 3, 1871; that the corporation was duly organized on March 18, 1871, and that the name of the defendant was entered on the books of the corporation as a stockholder and notices were issued and directed to him of all the meetings.

The defendant then asked the judge to instruct the jury that if they were satisfied upon the evidence that the defendant never attended any meeting of the corporation at the time of its organization, or after its organization, the action could not be maintained, although the corporation still retained his name upon its books, and sent him notices of the meetings; that it was not enough for the plaintiff to show that it retained Carey's name upon its books, and otherwise considered him as entitled to a share in the capital stock, unless they are also satisfied that Carey did some act after its organization in ratification of his agreement.

The judge refused to give these instructions, but instructed the jury that if the plaintiff entered the defendant's name on the books of the corporation, as a stockholder, issued and directed notices to him of all its meetings, and gave him the same opportunities to attend the meetings and participate in the proceedings thereof as were given to other stockholders, they were authorized to find that the defendant's offer was accepted, and that he was received as a member of the corporation. The jury found for the plaintiff, and the defendant alleged exceptions.

*H. L. Parker*, for the defendant.

*W. W. Rice & F. T. Blackmer*, for the plaintiff.

WELLS, J. In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, "to and with each other," is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case; to wit, as a contract with the common representative of the several associates.

Qn - who is  
the promisee  
Not other  
subscribers

W

In *Thompson v. Page*, 1 Met. 565, and *Ives v. Sterling*, 6 Met. 310, individuals subsequently selected by voluntary associations to receive and expend subscriptions, in accordance with the terms of the agreement of association, were allowed to maintain actions against individual subscribers for the amount of their several subscriptions. Being thus constituted the payees, they were construed to have become also



the promisees under the written agreement. The same principle applies where the agreement contemplates the organization of a corporation, and refers the payment of the subscriptions to the proper officers of such corporation. See *People's Ferry Co. v. Balch*, 8 Gray, 303, 311.

In this agreement the treasurer of the corporation to be established is expressly made payee. The corporation is the aggregate of the several individuals entering into the agreement, one of whose terms was that they should thus associate and confer their individual rights upon the corporation. We are of opinion that the corporation, and the corporation alone, is the proper party to bring an action upon such an agreement.

The corresponding agreements of the other subscribers, the organization of the corporation, and the allotment to the defendant of the shares for which he subscribed, furnish sufficient consideration for his promise to take and pay for those shares. Although his promise was originally voluntary, or in the nature of a mere open proposition, yet having been accepted and acted on by the party authorized so to do, before he attempted to retract it, he has lost the right to revoke. His proposition has become an accepted mutual contract, and is binding upon him as well as upon the corporation. The votes of the corporation indicate sufficient authority for the institution of this suit in the corporate name and behalf.

These considerations dispose of all the objections, taken in various forms, to the maintenance of the action. *D 19. 4 73, 74, 75, 78*

101/70 acc. v. 43/588.

Exceptions overruled.

93/528. (1892) Mayville Co. v. Johnson. Co sued off on following agreement signed by them et al "For the purp of forming a corp to have for its object, furnish electric light ... we the undersigned, hereby subscribe for stock to said corp opposite to our respective names unto to be due & payd up on formation of Corp & issuance of stock held (Westaring) The agree<sup>t</sup> is certainly valid; the corresponding promises of other signers, & common object sought to be accomplished by all parties to it, constitute a sufficient consideration for promise of J; & upon formation of Corp by persons signing agreement & its accept<sup>t</sup> & agree<sup>t</sup> of became bound to take & pay for number shares sub<sup>d</sup> for him (etc price et al). And its not material to right of J to maintain the actn that it is not expressly named in such agree<sup>t</sup> as promisee. The agree<sup>t</sup> is to be construed accordg to evident intention parties to it. It is just as clear as it appears that it was intention all parties that promise each should secure to benefit of corp when formed as if such intention were expressly declared; and therefore in legal effect the promise of J was to pay to Corp when organized. The corp really represents parties to a agreement it was not into exist<sup>t</sup> by them as agent to carry on bus named in agree<sup>t</sup> thru wh they were to secure benefits to arise thru mutual & common promises. In this ca a agree<sup>t</sup> of parties signing it was in legal effect if they form Corp & pay to as their common rep<sup>t</sup> (auth<sup>y</sup> their sub<sup>d</sup> for the Corp) is therefore auth<sup>y</sup> to sue upon such agree<sup>t</sup> as a C made for its benefit 502

99 BRYANT'S POND STEAM-MILL CO. v. FELT. 1895. 87 Me. 234.<sup>1</sup>  
 But a subscriber may withdraw prior to org'n. Co.

WALTON, J. The only question we find it necessary to consider is whether a subscriber to the capital stock of an unorganized corporation has a right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. We think he has. Such a subscription is not a completed contract. It takes two parties to make a contract. A non-existing corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it.

The right of subscribers to the capital stock of a proposed corporation to withdraw their subscriptions at any time before the organization of the corporation is completed has been affirmed in several recent and well considered opinions. The right rests upon the impregnable ground of the legal impossibility of completing a contract between two parties only one of which is in existence. There can be no meeting of the minds of the parties. There can be no acceptance of the subscriber's proposition to become a stockholder. There can be no mutuality of rights or obligations. There can be no consideration for the subscriber's promise. As said in one of our own decisions, it is a mere *nudum pactum*, — a promise without a promisee, — a contractor without a contractee. In fact, every element of a binding contract is wanting. If the subscriber's promise to take and pay for shares remains unrevoked till the organization of the proposed corporation is effected, and his promise has been accepted, then we have all the elements of a valid contract. Competent parties. Mutuality of duties and obligations. A valid consideration, the promise of one party being a sufficient consideration for the promise of the other. A promisee as well as a promisor. A contractee as well as a contractor. In fact, all the elements of a valid contract are present, and the subscription has become binding upon both of the parties. But, till the corporation has come into existence, all these elements are necessarily wanting, and the subscriber's promise amounts to no more than an offer, which, like all mere offers, may be withdrawn at any time before acceptance. When accepted, it becomes binding. Till accepted, it remains revocable. This conclusion is sustained by reason and authority.

In *Hudson Real Estate Co. v. Tower*, 156 Mass. 82 (1892), the action was founded on a subscription to the capital stock of an unorganized corporation, and the defense was based on an alleged withdrawal of the subscription. The right to withdraw was controverted.

<sup>1</sup> Statement and part of opinion omitted. — Ed.

The court held that at the time when the defendant signed the subscription paper declared on, it was not a contract, for want of a contracting party on the other side; that while such a subscription may become a contract after the corporation has been organized, still, until the organization is effected, and the subscription is accepted, it is a mere proposition or offer, which may be withdrawn, like any other unaccepted proposition or offer.

It is urged by the counsel for the plaintiff corporation that such subscriptions create binding and enforceable contracts between the subscribers themselves, and are therefore irrevocable, except with the consent of all the subscribers; and some of the authorities cited by him seem to sustain that view. But we find, on examination, that such views, when expressed, are in most cases mere dicta, and that the cases are very few in which such a doctrine has been acted upon. Reason and the weight of authority are opposed to such a view. Of course, subscription papers may be so worded as to create binding contracts between the subscribers themselves. But we are not now speaking of such subscriptions; or of voluntary and gratuitous subscriptions to public or charitable objects, which, when accepted and acted upon, become binding. We are now speaking only of subscriptions to the capital stock of proposed business corporations. With regard to such subscriptions, we regard it as settled law that they do not become binding upon the subscribers till the corporations have been organized and the subscriptions accepted; and that, till then, the subscribers have a right to revoke their subscriptions. And, in view of the fact that such subscriptions are often obtained by over persuasion, and upon sudden and hasty impulses, we are not prepared to say that the rule of law which allows such a revocation is not founded in wisdom. We think it is.

*As so. withdrawn or cancelled by § 1, 62, 64. Judgment for defendant.*

(B) Contracts in Behalf of a Corporation to be formed. Herein of Underwriting

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violation of the contract. The action is to recover damages for the breach of the contract. The answer sets up two defenses: (1) That plaintiff's employment was not for any stated time, but only from week to week; (2) that he was discharged for good cause. Upon the trial there was evidence reasonably tending to prove that in September, 1889, one C. A. Nimocks and others were engaged as promoters in procuring the organization of the defendant company to publish a newspaper; that, about September 12th, Nimocks, as such promoter, made a contract with plaintiff, in behalf of the contemplated company, for his services as advertising solicitor for the period of one year from and after October 1st, — the date at which it was expected that the company would be organized; that the corporation was not, in fact, organized until October 16th, but that the publication of the paper was commenced by the promoters October 1st, at which date plaintiff, in pursuance of his arrangement with Nimocks, entered upon the discharge of his duties as advertising solicitor for the paper; that after the organization of the company he continued in its employment in the same capacity until discharged, the following April; that defendant's board of directors never took any formal action with reference to the contract made in its behalf by Nimocks, but all of the stockholders, directors, and officers of the corporation knew of this contract at the time of its organization, or were informed of it soon afterwards, and none of them objected to or repudiated it, but, on the contrary, retained plaintiff in the employment of the company without any other or new contract as to his services.

There is a line of cases which hold that where a contract is made in behalf of, and for the benefit of, a projected corporation, the corporation, after its organization, cannot become a party to the contract, either by adoption or ratification of it. *Abbott v. Hapgood*, 150 Mass. 248, (22 N. E. Rep. 907;) *Beach, Corp.* § 198. This, however, seems to be more a question of name than of substance; that is, whether the liability of the corporation, in such cases, is to be placed on the grounds of its adoption of the contract of its promoters, or upon some other ground, such as equitable estoppel. This court, in accordance with what we deem sound reason, as well as the weight of authority, has held that, while a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after its organization, make such engagements its own contracts. And this it may do precisely as it might make similar original contracts; formal action of its board of directors being necessary only where it would be necessary in the case of a similar original contract. That it is not requisite that such adoption or acceptance be expressed, but it may be inferred from acts or acquiescence on part of the corporation, or its authorized agents, as any similar original contract might be shown. *Battelle v. Northwestern Cement & Concrete Pavement Co.*, 37 Minn. 89, (33 N. W. Rep.

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327.) See, also, Mor. Corp. § 548. The right of the corporate agents to adopt an agreement originally made by promoters depends upon the purposes of the corporation and the nature of the agreement. Of course, the agreement must be one which the corporation itself could make, and one which the usual agents of the company have express or implied authority to make. That the contract in this case was of that kind is very clear; and the acts and acquiescence of the corporate officers, after the organization of the company, fully justified the jury in finding that it had adopted it as its own.

The defendant, however, claims that the contract was void under the statute of frauds, because, "by its terms, not to be performed within one year from the making thereof," which counsel assumes to be September 12th, — the date of the agreement between plaintiff and the promoter. This proceeds upon the erroneous theory that the act of the corporation, in such cases, is a ratification, which relates back to the date of the contract with the promoter, under the familiar maxim that "a subsequent ratification has a retroactive effect, and is equivalent to a prior command." But the liability of the corporation, under such circumstances, does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company. Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed "ratification," yet a "ratification," properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. *In re Empress Engineering Co.*, 16 Ch. Div. 128; *Melhado v. Porto Alegre, N. H. & B. Ry. Co.*, L. R. 9 C. P. 505; *Kelner v. Baxter*, L. R. 2 C. P. 185. What is called "adoption," in such cases, is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date. The contract in this case was, therefore, not within the statute of frauds. The trial court fairly submitted to the jury all the issues of fact in this case, accompanied by instructions as to the law which were exactly in the line of the views we have expressed; and the evidence justified the verdict.

The point is made that plaintiff should have alleged that the contract was made with Nimocks, and subsequently adopted by the defendant. If we are correct in what we have said as to the legal effect of the adoption by the corporation of a contract made by a promoter in its behalf before its organization, the plaintiff properly pleaded the contract as having been made with the defendant. But we do not find that the evidence was objected to on the ground of variance between it and the complaint. The assignments of error are very numerous, but what has been already said covers all that are entitled to any special notice.

*Order affirmed.*

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## KELNER v. BAXTER.

1866. *Law Reports, 2 Common Pleas*, 171.1*Engg. 171.1* *It is presumed to be the same*

THE declaration was for goods sold and delivered, goods bargained and sold, interest, and upon accounts stated.

[Pleas omitted.]

At the trial before Erle, C. J., at the sittings in London after last Trinity Term, the following facts appeared in evidence:—The plaintiff was a wine merchant, and the proprietor of the Assembly Rooms at Gravesend. In August, 1865, it was proposed that a company should be formed for establishing a joint-stock hotel company at Gravesend, to be called The Gravesend Royal Alexandra Hotel Company, Limited, of which the following gentlemen were to be the directors, viz., Mr. L. Calisher, Mr. T. H. Edmands, Mr. M. Davis, Mr. Macdonald, Mr. Hulse, Mr. N. J. Calisher (one of the defendants), and the plaintiff. The plaintiff was to be the manager of the proposed company, and Mr. Dales (another of the defendants) was to be the permanent architect. One part of the scheme was that the company should purchase the premises of the plaintiff for a sum of 5000*l.*, of which 3000*l.* was to be paid in cash, and 2000*l.* in paid up shares, the stock, &c., to be taken at a valuation; and this was carried into effect and completed, the other defendant (Baxter) being the nominal purchaser on behalf of the company. In December a prospectus was settled. On the 9th of January, 1866, a memorandum of association was executed by the plaintiff and the defendants and others.

*C 2 of 12 promissory notes*  
Pending the negotiations the business had been carried on by the plaintiff, and for that purpose additional stock had been purchased by him; and on the 27th of January, 1866, an agreement was entered into for the transfer of this additional stock to the company, in the following terms:—

“January 27th, 1866.

“To John Dacier Baxter, Nathan Jacob Calisher, and John Dales, on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited.

“Gentlemen, — I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule hereto, for the sum of 900*l.*, payable on the 28th of February, 1866.

(Signed) “John Kelner.”

Then followed a schedule of the stock of wines, &c., to be purchased, and at the end was written as follows:—

<sup>1</sup> Pleadings and arguments omitted. — Ed.

"To Mr. John Kelner.

"Sir, — We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed.

(Signed) "J. D. Baxter,  
"N. J. Calisher,  
"J. Dales,

"On behalf of the Gravesend Royal Alexandra Hotel Company, Limited."

In pursuance of this agreement the goods in question were handed over to the company, and consumed by them in the business of the hotel; and on the 1st of February a meeting of the directors took place, at which the following resolution was passed: "That the arrangement entered into by Messrs. Calisher, Dales, and Baxter, on behalf of the company, for the purchase of the additional stock on the premises, as per list taken by Mr. Bright, the secretary, and pointed out by Mr. Kelner, amounting to 900*l.*, be, and the same is hereby ratified." There was also a subsequent ratification *by the company*, viz., on the 11th of April, but this was after the commencement of the action.

The articles of association of the company were duly stamped on the 13th of February, and on the 20th the company obtained a certificate of incorporation under the 25 & 26 Vict. c. 89.

The company having collapsed, the present action was brought against the defendants upon the agreement of the 27th of January.

On the part of the defendants oral evidence was tendered for the purpose of showing that it never was intended that they should be personally liable; but his Lordship rejected it. It was then submitted that, inasmuch as the agreement was not entered into by the defendants personally, but only as agents for the hotel company, they thereby incurred no personal obligation to the plaintiff, who was himself one of the promoters.

For the plaintiff it was insisted that, there being no company in existence at the time of the agreement, the parties thereto had rendered themselves personally liable; and that there could be no ratification of the contract by a subsequently created company.

A verdict was taken for the plaintiff for 900*l.*, subject to leave reserved to the defendants (upon giving security) to move to enter a nonsuit, on the ground that the agreement of the 27th of January did not make them personally liable.

Nov. 6, 1866. *Seymour, Q. C.*, obtained a rule *nisi* accordingly, and also for a new trial on the ground of misdirection on the part of the learned judge, "in not allowing witnesses to be called to contradict the plaintiff as to the defendants' personal liability."

*J. Brown, Q. C.*, and *Thesiger*, shewed cause.

*Seymour, Q. C.*, in support of the rule.

ERLE, C. J. I am of opinion that this rule should be discharged. The action is for the price of goods sold and delivered: and the ques-

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tion is whether the goods were delivered to the defendants under a contract of sale. The alleged contract is in writing, and commences with a proposal addressed to the defendants, in these words:—"I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule hereto, for the sum of 900*l.*, payable on the 28th day of February, 1866." Nothing can be more distinct than this as a vendor proposing to sell. It is signed by the plaintiff, and is followed by a schedule of the stock to be purchased. Then comes the other part of the agreement, signed by the defendants in these words,—"Sir, We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed." If it had rested there, no one could doubt that there was a distinct proposal by the vendor to sell, accepted by the purchasers. A difficulty has arisen because the plaintiff has at the head of the paper addressed it to the defendants, "on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited," and the defendants have repeated those words after their signatures to the document; and the question is, whether this constitutes any ambiguity on the face of the agreement, or prevents the defendants from being bound by it. I agree that if the Gravesend Royal Alexandra Hotel Company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby: and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made. The history of this company makes this construction to my mind perfectly clear. It was no doubt the notion of all the parties that success was certain: but the plaintiff parted with his stock upon the faith of the defendants' engagement that the price agreed on should be paid on the day named. It cannot be supposed that he for a moment contemplated that the payment was to be contingent on the formation of the company by the 28th of February. The paper

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expresses in terms a contract to buy. And it is a cardinal rule that no oral evidence shall be admitted to shew an intention different from that which appears on the face of the writing. I come, therefore, to the conclusion that the defendants, having no principal who was bound originally, or who could become so by a subsequent ratification, were themselves bound, and that the oral evidence offered is not admissible to contradict the written contract. *Rule on ev.*

WILLES, J. I am of the same opinion. Evidence was clearly inadmissible to shew that the parties contemplated that the liability on this contract should rest upon the company and not upon the persons contracting on behalf of the proposed company. The utmost it could amount to is, that both parties were satisfied at the time that all would go smoothly, and consequently that no liability would ensue to the defendants. The contract is, in substance, this, — "I, the plaintiff, agree to sell to you, the defendants, on behalf of the Gravesend Royal Alexandra Hotel Company, my stock of wines;" and, "We, the defendants, have received your offer, and agree to and accept the terms proposed; and you shall be paid on the 28th of February next." Who is to pay? The company, if it should be formed. But, if the company should not be formed, who is to pay? That is tested by the fact of the immediate delivery of the subject of sale. If payment was not made by the company, it must, if by anybody, be by the defendants. That brings one to consider whether the company could be legally liable. I apprehend the company could only become liable upon a new contract. It would require the assent of the plaintiff to discharge the defendants. Could the company become liable by a mere ratification? *Ratify.* Clearly not. Ratification can only be by a person ascertained at the time of the act done, — by a person in existence either actually or in contemplation of law; as in the case of assignees of bankrupts and administrators, whose title, for the protection of the estate, vests by relation. The case of an executor requires no such ratification, inasmuch as he takes from the will. It is unnecessary, however, to pursue this further. In addition to the cases cited at the bar, I would refer to *Gunn v. London and Lancashire Fire Insurance Company*,<sup>1</sup> where this Court, upon the authority of *Payne v. New South Wales Coal and International Steam Navigation Company*,<sup>2</sup> held that a contract made between the projector and the directors of a joint-stock company provisionally registered, but not in terms made conditional on the completion of the company, was not binding upon the subsequent completely registered company, although ratified and confirmed by the deed of settlement: and Williams, J., said, that, "to make a contract valid, there must be parties existing at the time who are capable of contracting." That is an authority of extreme importance upon this point; and, if ever there could be a ratification, it was in that case. Both upon principle and upon authority, therefore, it seems to me that the company never could be liable upon this contract: and,

<sup>1</sup> 12 C. B. (N. S.) 694.

<sup>2</sup> 10 Ex. 233; 24 L. J. (Ex.) 117.

Rule - construed (a) It was put by my Lord, construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the persons signing it would be personally liable. Putting in the words "on behalf of the Gravesend Royal Alexandra Hotel Company," would operate no more than if a person should contract for a quantity of corn "on behalf of my horses." As to the suggestion that there should have been a special count, that is quite a mistake. There need not be a special count unless there was a person existing at the time the contract was made who might have been principal. The common count perfectly well represents the character of the liability which these defendants incurred. It is quite out of the question to suppose that there was any mistake. The document represents the real transaction between the parties. I think that the course taken at the trial was perfectly correct, and that the rule should be discharged.

BYLES, J. I am of the same opinion. At first, I must confess, I entertained some doubt, the contract appearing on the face of it to have been entered into by the defendants on behalf of the company. The true rule, however, is that stated by Mr. Thesiger, viz., that persons who contract as agents are generally personally responsible where there is no other person who is responsible as principal. Suppose this company never came into existence at all, could it be doubted that these defendants must be held to have bound themselves personally? Then, was it contemplated that the liability was conditional only until the company should be formed? It is said that the contract was ratified by the company after it came into existence. There could, however, be no ratification. *Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*: but the ratification must be by an existing person, on whose behalf the contract might have been made at the time. That could not be so here: a subsequent ratification by the company could only be with the assent of the plaintiff; and then it would be a new contract. Mr. Seymour contended that the contract might amount to a personal undertaking on the part of the defendants that the company shall pay. That would make them equally liable. Any objection on the score of the Statute of Frauds would be cured by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97. In no way, therefore, in which it can be put, could the company become responsible.

[The concurring opinion of KEATING, J., is omitted.]

Liab<sup>y</sup> of Off. of Priv. Corpor. C<sup>2</sup>. Corp. Act 1913 B 902 Rule discharged.

## 103 HECKMAN'S ESTATE.

1896. 172 *Pennsylvania*, 185.

## OPINION BY MR. JUSTICE WILLIAMS: —

This case depends upon the inferences to be drawn from the evidence submitted to the orphans' court. The auditing judge reached one conclusion while his associates reached the opposite one, and it becomes necessary to inquire whether the evidence fairly sustains the decree made by the majority of that court. It appears that several persons, among whom were Heckman and Shafto, had arranged to organize a company for the manufacture and sale of brick. Shafto was the only one of the number who was an experienced brickmaker, and his judgment as to the preliminary arrangements, including the selection of materials and the location of a brickyard, was relied on by all his associates. He was at the same time the agent of Ward, employed by him to secure a tenant for a brickyard owned by him, with the promise that he should have one quarter of the rent obtained. Under these circumstances he directed the attention of his associates to Ward's property, proposing a lease of the yard and of the right to take the clay, to be paid for by a royalty of one dollar per thousand bricks, with a minimum royalty of twenty-five hundred dollars for the first year and four thousand per annum thereafter. Two or three of his associates, including Heckman, visited the property at his instance. The brick company had not been organized. A meeting was brought about by Shafto between Ward and his own associates in the brick enterprise, which resulted in a lease upon the terms Shafto had proposed.

Heckman was to become the president of the company when it was fully organized, and the lease was executed by him on behalf of the company then in process of formation, and as soon as the company was in condition to take it he assigned it directly to the corporation. This was done in pursuance of an understanding to which his associates, including Shafto, the agent of the lessor, were parties. The bills were thereafter made to the Philadelphia Brick Company, presented to its officers, and paid, except in one instance, by its checks.

Under the circumstances disclosed by the evidence, we think the knowledge of Shafto was notice to his principal that the tenant of the yard and the purchaser of the clay was the corporation and not any member or officer thereof; that the corporation was the prospective operator and owner of the works, and was to be looked to for the rents or royalties. The subsequent course of dealing would indicate actual knowledge of the facts, and recognition of the relation of lessor and lessee between himself and the corporation on the part of Ward.

We are not prepared to adopt the conclusion reached by the court below, that the bad faith of Shafto in his dealings with his associates rendered the contract he had negotiated between them and his employer absolutely void. As to any right of action or interest of his own, that result might well follow; but we can see no reason why the

lessee should not recover for his royalties, at least as to so much thereof as he was actually to receive. It is not necessary, however, to enter upon that subject. We place the affirmance of this judgment on the ground already indicated. The agent negotiated this lease. He knew perfectly well who was to be the lessee, and by whom the enterprise was to be conducted. He was himself a member of the company for whose use and benefit Heckman became temporarily a substitute; and it would have been a fraud on Heckman for Shafto to attempt to hold him personally responsible for what he well knew was understood to be the obligation of the corporation. The principal cannot secure the benefit of the contract and repudiate the means by which its execution was induced. He stands on the ground on which his agent has put him.

The assignments of error are overruled and the decree is affirmed.

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### WEATHERFORD, &c. R. CO. v. GRANGER

1894. 86 Texas, 351.

GAINES, Associate Justice. This suit was brought by the defendant in error against the plaintiff in error to recover upon open account for services rendered. The plaintiff in the trial court obtained a judgment, which was affirmed by the Court of Civil Appeals. This writ of error is sued out for the purpose of reversing that judgment.

The plaintiff in error, the defendant in the trial court, is a corporation, organized under the general law of the State for the purpose of constructing and operating a railroad. The defendant in error, the plaintiff in the trial court, is a practising attorney at law. The services for which a recovery was sought were for aiding to raise a bonus and for legal advice and assistance, and were rendered both before and after the filing with the Secretary of State the company's articles of incorporation.

The testimony, as shown by the statement of facts, in so far as it bears upon the question before the court, is in substance as follows:

The plaintiff testified, that in March, 1889, he was employed by one Anderson to assist in raising a bonus for the defendant company, and "agreed that the said company would pay him well for his services;" that Anderson was a promoter of the corporation, and represented himself as its general manager, and employed plaintiff not only to assist in procuring the bonus, but to attend to all the company's business as its attorney; that in September, 1889, Anderson allowed his account, and was at that time the owner of a majority of the stock, which he subsequently transferred to one Stone, the president of the company, and his associates.

Stone testified, on behalf of the company, that in the spring of 1889, in Kansas City, Missouri, he employed Anderson to go to

<sup>1</sup> Arguments omitted. — Ed.

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Weatherford, and to procure a bonus of \$40,000 and survey the right of way for a railroad from that city to Mineral Wells, and to pay him \$1000 for his services; that he had paid Anderson according to his agreement; that he did not know that Anderson had ever employed plaintiff for any purpose; that Anderson was never general manager for the company, and held no office in it except that of director; that he knew that the plaintiff was interesting himself in procuring the bonus, but supposed he was working for one Johnson, who was one of the charter members, and who owned certain coal lands which he wished to sell to the projectors of the railroad; that plaintiff never said anything to him about the company owing him anything, and that the first he knew of plaintiff's claim was when this suit was brought.

There was further testimony tending to show, that Anderson was the chief active promoter of the enterprise, and that he had the principal management of the business from its inception in March until he retired in September, 1889; and that during this time the plaintiff was frequently in attendance upon him, aiding and assisting him in procuring the bonus, and otherwise promoting the objects of the company.

No controversy is raised in this court as to the fact of plaintiff's services, or as to their value.

The trial judge, as conclusions of fact, found, in substance, that some kind of a company was formed to build the railway from Weatherford to Mineral Wells; that Anderson was "the principal mover in said scheme, and was so recognized by all parties;" that he employed plaintiff to assist him in procuring a bonus and in otherwise advancing the enterprise, and that the plaintiff rendered service under said employment, both before and after the articles of the company were filed; that the bonus was raised, and was, after its incorporation, accepted by said company.

The Court of Civil Appeals adopt the findings of the trial judge, and add additional findings as follows: "The charter of the defendant company was signed and acknowledged about June 1, 1889, and was filed in the office of the Secretary of State at Austin, July 2, 1889. The bonus or subsidy was not secured until after the filing of the charter. The record would have justified the trial court, and so justifies us, in finding, as we do, the fact to be, that in availing itself of the subsidy secured, the company knew of the services of the plaintiff in raising the bonus."

Under the statute, the corporation came into existence when its articles of incorporation were filed in the office of Secretary of State. Rev. Stats., arts. 4104, 4105. Although the trial court found that the services for which plaintiff sued were rendered in part before and in part after the filing of the articles, their value was assessed as an entirety at \$500, and judgment was rendered for the whole amount. In this there was error. We are of opinion, that under the

*Bonus secured  
after charter*

*Services, part  
part a. & part  
after incorp.*

circumstances of this case, as shown by the evidence, the defendant corporation can not be held liable to the plaintiff for any services rendered by him before it was brought into legal existence.

Upon the question as to the liability of a corporation growing out of contracts made on its behalf by its promoters, there is considerable diversity and some conflict of opinion. But there are some propositions affecting this question upon which the authorities seem to be in substantial accord. A promoter, though he purport to act on behalf of the projected corporation, and not for himself, can not be treated as agent, because the nominal principal is not then in existence; and hence when there is nothing more than a contract by a promoter, in which he undertakes to bind the future corporation, it is generally conceded that it can not be enforced. *Kelner v. Baxter*, L. R., 2 Com. Pl., 174; *Melhado v. Railway*, L. R., 9 Com. Pl., 503.

The promoters themselves are liable upon the contract, unless the person with whom they engage agrees to look to some other fund for payment. *Kerridge v. Heese*, 9 Carr. & P., 200.

The statute, however, which authorizes the incorporation may provide that the corporation, when formed, shall pay the necessary expenses of promoting the scheme; in such a case, though the right of action is dependent upon the contract, the liability is created by the statute. *Re Rotherham, etc., Co.*, L. T. Rep., N. S., 217.

It is now held in England, that although the articles of association bind the company to pay the expenses of its promotion, a third party can not avail himself of such a provision so as to maintain an action against the company. *Re Rotherham, etc., Co.*, supra; *Eley v. Assurance Co.*, 34 L. T. Rep., N. S., 190.

It is also generally held, that contracts by promoters made on behalf of the corporation, within the scope of its general authority, may be adopted by the latter after its organization. Some of the courts say they may be ratified; but ratification presupposes a principal existing at the time of the agent's action, and it seems to us, therefore, that the term is not applicable in its technical sense. *McArthur v. Printing Co.*, 51 N. W. Rep., 215; *Spiller v. Paris Skating Rink Co.*, 7 Ch. Div., 368.

With the exception of the law courts of England, the rule is also very generally recognized, that if a contract be made on behalf of a corporation by its promoters, and the corporation, after its organization, with a knowledge of the facts, accept its benefits, it must take it with its burdens; and if the other party has performed the stipulation binding upon him, it may be enforced as against the corporation. *Spiller v. Rink Co.*, supra; *Loucke v. Warehousing Co.*, 6 Ch., 67.

But as to the application of the rule last announced, the courts differ in opinion. A leading case upon this subject is *Edwards v. Grand Junction Railway Company*, 1 Milne & Cr., 650. There the promoters of the railway company had entered into a contract with the trustees of a turnpike company, in which the latter agreed to with-

Rule adopted

draw their opposition to an act of Parliament for the incorporation of the railway company, in consideration of an agreement by the promoters to insert certain clauses in the act as to the nature of the necessary constructions at the crossing of the railway and the turnpike road, and the opposition was withdrawn, but the clauses were not inserted; and it was held, that the railway company should be enjoined from constructing the crossing in a manner different from that specified in the clauses which had been agreed upon and had been omitted. The correctness of the ruling in this case was seriously questioned in the House of Lords in *Preston v. Railway*, 5 House of Lords, 605, and in *Caledonian Railway Co. v. Helensburg*, 2 McQueen, 391. Same case, 2 Jur., N. S., 695. We presume the doubt as to this case arises from the fact that the only benefit accepted by the defendant company was the exercise of the powers conferred upon it by the act of Parliament.

When the promoters of a railway company have agreed with a landed proprietor through whose estates the road is projected to run, to take the requisite quantity of his land at a stipulated price, and after the corporation is formed it takes the land, it is certainly equitable that the company should be made to pay the agreed compensation; and the doctrine is recognized in many English equity cases. *Stanley v. Railway*, 3 Milne & Cr., 773; *Gooday v. Colchester Railway Co.*, L. R., 15 Eq., 596; *Preston v. Liverpool Railway Co.*, L. R., 7 Eq., 124; *Edwards v. Grand Junction Railway Co.*, 1 Milne & Cr., 650.

The same rule has been announced also in many American cases. *Little Rock Railway Co. v. Perry*, 37 Ark., 164; *Paxton Cattle Co. v. Bank*, 21 Neb., 621; *Grape Sugar Co. v. Small*, 40 Md., 395; *Bommer v. Manufacturing Co.*, 81 N. Y., 468; *Battelle v. Pavement Co.*, 37 Minn., 89; *McArthur v. Printing Co.*, supra.

Having exercised rights and enjoyed benefits secured to it by the terms of a contract made by its promoters in its behalf, a corporation should be held estopped to deny its validity.

Again, when the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on part of the other party to the agreement, unless withdrawn by him, and may be accepted and adopted by the corporation after such organization; and the exercise of any right inconsistent with the nonexistence of such contract might be deemed conclusive evidence of such adoption.

But there are some cases which go a step further. *Low v. Railway*, 45 New Hampshire, 370, was a case of a Vermont corporation sued in New Hampshire upon a contract made in the former State. After a charter had been granted, but before an organization had been effected, a public meeting was held to promote the enterprise, at which, it is to be presumed from the opinion, the incorporators were present or were represented. A proposition was made that the plain-



tiff should be employed and paid to visit various towns and cities to interest capital in the projected scheme, and to solicit and procure subscriptions. The plaintiff accepted the offer and performed the services, and it was held that the corporation was liable. The court determined that the question of liability depended upon the law of Vermont, as announced in the case of *Hall v. Railway*, 28 Vermont, 401. But they were also inclined strongly to think, that upon general principles the company, by accepting subscriptions which were procured by the plaintiff, bound itself to pay for his services. They also seem to recognize the doctrine, that after a charter has been granted a majority of the corporators have the power to make contracts necessary to perfect the organization, which may be binding upon the company when formed. But they also lay stress upon the fact that the charter of the defendant corporation provided, that "the expenses of all surveys and examinations, as also of the preliminary surveys already made and making, and all manner of incidental expenses relating thereto, shall be paid by said corporation."

In *Hall v. Railway*, supra, a corporator was held entitled to recover for necessary services in organizing the company, although there was no express promise by any one that he should be paid. Unless the charter of the company provided for the payment of such expenses, this decision we think is unsupported by authority.

It is generally held, that in the absence of such provision in the act of incorporation in case of a special charter, or in the general law or in the articles of incorporation under a general law, no implied promise can be imputed to a corporation to pay for the services of a corporator or promoter before the corporation comes into existence. A contract made by promoters may be adopted by a corporation, expressly or impliedly, by exercising rights under it; but otherwise it is not binding upon such corporation. *Kelner v. Baxter*, supra; *Melhado v. Railway*, supra; *Railway v. Ketchum*, 27 Conn., 170; *Kerridge v. Hesse*, 9 Carr. & P., 200; *Munson v. Railway*, 103 N. Y., 58; *Morrison v. Mining Co.*, 52 Cal., 306; *Gent v. Ins. Co.*, 107 Ill., 652; *Railway v. Sage*, 65 Ill., 328; *Western, etc., Co. v. Cousley*, 72 Ill., 531; *Buffington v. Borden*, 80 Wis., 635; see also, *Railway v. Helensburg*, 2 McQueen (H. of L.); same case, 2 Jur., N. S., 695; *Taft v. Bank*, 141 Pa., 550.

Now, when it is said that when a corporation accepts the benefit of a contract made by its promoters, it takes it *cum onere*, it is important to understand distinctly what is meant. There is, so far as this matter is concerned, a radical difference between a promise made on behalf of the future corporation in the contract itself, the benefits of which the corporation has accepted, and the promise in a previous contract to pay for services in procuring the latter to be made. This is well illustrated by the facts of the present case. Here a proposition was made on behalf of the company, by its promoters, that if a bonus should be subscribed and paid to it, it would build its road be-

What is a corp  
of benefits to a C.

Illustration

tween certain points, and would carry coal at a certain stipulated rate. By accepting the bonus, the company became bound to fulfill the stipulations of that contract. That was the burden which it took with the benefit of the agreement. But it also appears that one of the promoters promised the plaintiff, that if he would assist in procuring subscribers to the bonus, the company would pay him for his services. This was no part of the contract the benefits of which were taken by the defendant.

The benefits of a contract are the advantages which result to either party from a performance by the other; and in like manner its burdens are such as its terms impose. A more accurate manner of stating the nature of the plaintiff's demand is to say, that the defendant has accepted the benefit of the plaintiff's services and should pay for them. It is true, in one sense, that the company has had the benefit of plaintiff's services, and it is equally true that it would have had that benefit if the services had been rendered under an employment by the subscribers to the bonus; and yet in the latter case it could not be claimed that the company would be liable for such services, unless payment for them by the company were made one of the terms of the contract between the company and the subscribers.

In *Re Rotherham, etc., Company*, 50 Law Times Reports, New Series, 219, in the opinion of one of the justices, this language is used: "It is said that Mr. Peace has an equity against the company, because the company had the benefit of his labor. What does that mean? If I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say, that because a person gets the benefit of work done by somebody else, he is liable to pay the person who did the work."

There is more doubt as to the plaintiff's right to recover for his legal services in advising as to the articles of incorporation and in correcting and preparing this paper. Such services are usually necessary, and it would seem that the corporation should pay for them. Such payment is frequently provided for in the act of incorporation, or in the articles when the incorporation is effected under a general law. When such is the case, persons who take stock in the company are chargeable with notice that a liability for this purpose has already been created, and it is proper for the corporation to discharge it. But in the absence of such provision in the statute or in the articles, it may be unjust to shareholders to charge the corporation with liabilities of which they had no actual knowledge at the time they accepted the shares. We therefore hold, with some hesitation, that claims for the necessary expenses of the organization, under our statute, should not be excepted from the general rule applicable to contracts made before the corporation has come into legal existence.

Applying the rules we have announced to the case before us, it is apparent that the plaintiff has recovered, in part at least, for services

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for which the defendant was not bound to pay. He made his contract before the company had a legal existence as a corporation, with a single promoter; and it is a matter of no moment that the promoter was the general manager of the project and became the owner of the majority of the stock upon its organization. There were other stockholders. The law requires that there should be ten at least. Rev. Stats., art. 4099.

The evidence does not disclose that his contract with Anderson was actually known to any other person; nor do we see any other circumstance from which knowledge should necessarily be inferred. Since Anderson had no power to bind the future corporation, but could bind himself, the inference from his assisting Anderson would be that he was acting gratuitously, or that Anderson had agreed to pay him.

Anderson was interested in shifting his contract upon the company; and it may be doubted whether, although he became a director, notice to him could be deemed notice to the company. The Court of Civil Appeals find, however, that the company had notice.

Waiving the question of the right of the court to supplement the finding of the trial judge under such evidence, and the further question whether there be any evidence to support this conclusion, it follows from what we have already said, that the question of the company's knowledge does not affect the case. The plaintiff's contract with Anderson, though made by the latter on behalf of the company, was not a lien, encumbrance, or burden upon the contract between the subscribers to the bonus and the defendant, and it incurred no liability on the former contract by accepting the benefit of the latter.

The evidence was sufficient to sustain a recovery by the plaintiff for the value of his services rendered after the corporation was created; but the court below failed to find separately the reasonable worth of such services. Therefore the entire judgment must be reversed.

We deem it proper to say, in conclusion, that if the opinion in the case of *McDonough v. Bank*, 34 Texas, 309, is to be construed as holding that merely by accepting the benefit of the plaintiff's labor, the defendant ratified and became bound under the promoter's contract, it does not meet our approval. Whether the contract in that case was one which the bank had the power to ratify, is to say the least a doubtful question; but it is one that does not concern us here, and upon which we express no opinion.

The judgments of the District Court and of the Court of Civil Appeals are reversed and the cause remanded.

*Reversed and remanded.*

*cf. Park v. Steenberg. 124 P. 524*

Device for enabling Corps to take adv. in w<sup>o</sup> apt to make it com. a party: Pm acts  
for Corps. - no need for suit for op. perf: atty perf:

CARMICHAEL'S CASE. *Ca 929*

1896. 2 Chancery, 643.

THIS was an appeal by Carmichael from a decision of Stirling, J., refusing an application to strike his name out of the register of shareholders.

The company was brought out in February, 1896, and was formed to purchase from Mr. C. B. Phillips and work certain mining property of his. The price was 145,000 *l*. The company was to have a nominal capital of 175,000 *l*. in 1*l*. shares. The purchase money was to be paid, as to 58,333 *l*. in fully paid-up shares, as to 30,000 *l*. in cash, and as to 56,667 *l*. in cash or shares.

On February 21, 1896, Carmichael signed an underwriting contract in the form of a letter addressed to Phillips: "I agree, for the consideration below stated, to subscribe for 1000 shares of the above issue, and to pay for the same on the conditions named in the prospectus, or any modification thereof, or of the title of the company, or the directors or officers, so long as the capital of the company and the purchase price of the property are not altered; and I hereby inclose my application for such shares and a cheque for 2*s*. 6*d*. per share deposit in respect of such shares, which deposit I authorize and request you to pay over to the above-named company; and I undertake to pay the further moneys payable in respect of any shares I have to take up under the terms of this contract. If, on or before the public issue of the prospectus, there are 60,000 shares of the above issue bonâ fide and duly applied for by the public, then no allotment is to be made to me in respect of this agreement, and my application and the said deposit is to be forthwith returned to me by the said company. If less than such 60,000 shares are applied for by the public, then I am only to be allotted my proportion of the deficiency between the amount so subscribed for by the public and such 60,000 shares, pro ratâ with any other persons who have signed or may sign underwriting contracts in connection with the above issue. If on the public issue of the prospectus, and before the closing of the list, I deliver to you applications for shares from responsible persons to your satisfaction, such applications shall go primarily in relief of my obligation under this contract. In either case, I am to receive from you a commission of 7½ per cent in cash and 7½ per cent in fully paid shares of the said company upon the total shares hereby underwritten by me within fourteen days after the completion of the purchase by the above company, if the whole of such 60,000 shares are applied for by the public; but in the event of the public not applying for the whole of such 60,000 shares, then such commission is to be payable by you within fourteen days after payment by me to the company of the allotment money in respect of my proportion of the deficiency of such

*Parties.  
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shares, or the completion of the purchase by the above company, whichever event shall be last; and I authorize you, if you think fit so to do, to apply my said commission or any part thereof in payment to the company of or on account of the said allotment moneys. I further agree that this agreement and my said application shall be irrevocable on my part, and shall, notwithstanding any withdrawal on my part or any repudiation of my responsibility hereunder or thereunder, be sufficient to authorize and empower you to make any further or other application on my behalf, and also be sufficient to authorize and empower the directors of the company to allot to me the before-mentioned shares, and to enter my name on the register of members in respect thereof."

On February 22 Carmichael signed and handed in an application for 1000 shares, and gave a cheque payable to the company for 125*l.*, the amount of the deposit payable on application.

On the same day Phillips sent to Carmichael a letter headed with the name of the company: "I accept your underwriting contract on the terms mentioned to the extent of 1000 shares. C. B. Phillips."

On March 24 the company was incorporated, and advertisements were issued stating that the subscription list would open on the 27th and close on the 30th of that month.

On the 27th Carmichael directed his bankers not to pay the cheque, which accordingly they refused to pay. On the 30th he wrote to Phillips repudiating his underwriting contract, and on the same day wrote to the secretary of the company the following letter: "Please take notice that I withdraw my underwriting in above company, and withdraw any authority contained in the underwriting letter to apply for any shares on my behalf."

At a board meeting of directors on April 2 the secretary produced the last-mentioned letter. Mr. Phillips, who was present, then produced the underwriting letter, insisted that Carmichael had no right to withdraw, and handed in on his behalf a fresh application for 980 shares in pursuance of the underwriting contract, that being the number which, according to the contract, ought, in the events which had happened, to be allotted to him. They were accordingly allotted to him, and he was placed on the register in respect of them.

Stirling, J., held that the authority given to Phillips by the underwriting letter was an authority coupled with an interest, and therefore irrevocable. His Lordship, therefore, refused to remove Carmichael's name from the register. Carmichael appealed.

LINDLEY, L. J. I do not think there is any difficulty in this case. Mr. Bramwell Davis has asked us to treat this as a complex transaction consisting of two parts—one a contract and one an authority, and he says, "Although I agree that I cannot revoke my contract, still I am at liberty to revoke my authority." Now, I do not mean to say that there may not be cases as to which that contention would be well founded; but when we look at this case and see the purpose for which

the authority is given and the object of it, which is to enable a contract to be performed in which Mr. Phillips was interested, his argument will not hold. Let us look at the document itself. It is a letter, or, as it is called, an underwriting contract. Of course, it is not a contract until it is accepted. It is addressed to Mr. Phillips, the vendor of some property to this company, who was to be paid out of money raised by the issue of shares. He had, therefore, a clear and direct interest in raising the capital, out of which he was to be paid, and Mr. Carmichael knew that. That is common ground. Under these circumstances he signs this document, which is called an underwriting contract, and it is addressed to Mr. Phillips. It is in these terms: [His Lordship read the material parts of the document down to the last clause.]

Then comes this clause, which is very important: "I further agree that this agreement and my said application shall be irrevocable on my part, and shall, notwithstanding any withdrawal on my part or any repudiation of my responsibility hereunder or thereunder, be sufficient to authorize and empower you to make any further or other application on my behalf, and also be sufficient to authorize and empower the directors of the company to allot to me the before-mentioned shares, and to enter my name on the register of members in respect thereof." Now, what is the true meaning of that? It is part of a bargain by which, for valuable consideration, Mr. Carmichael agrees to take certain shares, and that is for the benefit of Mr. Phillips as he knows; and in order to enable Mr. Phillips the better to secure the performance of the contract Mr. Carmichael authorizes Mr. Phillips to apply for shares in his name, and he agrees not to revoke that authority even if he could do it without such a clause. Now, Mr. Phillips acted with perfect bona fides, and upon the terms of that authority he does apply in Mr. Carmichael's name for 980 shares, which are allotted to him. Why is Mr. Carmichael not to be held a member of this company? Can it under the circumstances be said, in the language of s. 35 of the Companies Act, 1862, that his name is "without sufficient cause entered in the register of members"? It appears to me there is ample cause. The attempt to make out that he is entitled to revoke the authority although he cannot revoke the contract entirely fails.

Stirling, J., in deciding this case has referred to an observation of Williams, J., in the case of *Clerk v Laurie*,<sup>1</sup> which runs thus: "What is meant by an authority coupled with an interest being irrevocable is this — that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable." That is the principle on which Stirling, J., decided this case, and it appears to me the principle properly applicable to it. The appeal must be dismissed with costs.

<sup>1</sup> 2 H. & N. 199, 200.

LOPES, L. J. The question in this case is whether the company had authority to allot these shares to Mr. Carmichael. That question depends on whether the authority given to Mr. Phillips, who was the vendor, was revocable or not. If it was an authority coupled with an interest, it would be irrevocable. The question that really arises is whether in this case it is an authority coupled with an interest. I think the answer is a very short and a very complete one. What was the object? The object was to enable Mr. Phillips, the vendor, to obtain his purchase money, and, in the language of Williams, J., it therefore conferred a benefit on the donee of the authority. I think, therefore, the judgment of Stirling, J., is perfectly right, and that Mr. Carmichael is a member of this company, and is not entitled to have his name struck out.

RIGBY, L. J. I am of the same opinion and for the same reasons, and have nothing to add.

Solicitors for appellant: *Mellor, Smith & May.*

Solicitors for respondents: *Wilson, Bristows & Carpmael.*

(c) *Liability of Promoters arising from the Sale of Property to the Corporation, when formed.*

ERLANGER v. NEW SOMBRERO PHOSPHATE CO. *enq 21, 926*

1878. *Law Reports, 3 Appeal Cases, 1218.*<sup>1</sup>

APPEAL against a decision of the Court of Appeal which had reversed a decree of Vice Chancellor *Malins*.

*Sombrero*, a small island in the West Indies, the property of the Crown, had been leased out by the Crown for 21 years from 1865. This lease had been assigned to "The Sombrero Company," which undertook to work the beds of phosphate of lime with which the island abounded. This company was ordered to be wound up. The lease was ordered to be sold by the official liquidator, Mr. Chatteris. Erlanger and others formed a syndicate to purchase it, and did purchase it for £55,000. The purchase was effected by a provisional contract Aug. 30, 1871, though not formally concluded until later. The syndicate desired to resell the lease at a profit; and with that view proceeded to get up a company to purchase it from the syndicate.

Erlanger, who acted for the syndicate, took steps to form a company, under the Companies Act. A memorandum of association was drawn up by the solicitor of the syndicate, and was signed by seven persons all of whom were mere nominees of the syndicate. The articles of association for the company were drawn by the same solicitor, and bear date Sept. 20, 1871. These articles provide that the first board of directors shall consist of five specified persons; that two directors shall be a quorum for the transaction of business; and that the directors may, without any further authority from the members, adopt and carry into effect the contract, of even date, for the assignment to the company of the island of Sombrero for the residue of the term of the lease.

A contract had also been drawn up, and dated Sept. 20, for the sale of the lease to the new company. This contract purported to be made between Evans as vendor and Pavy as purchaser on behalf of the new company. Evans was a trustee or agent for the members of the syndicate. The contract was, on the face of it, a provisional one,

<sup>1</sup> Case abridged. Arguments omitted; also greater part of the opinions. — Ed.



subject to the formation of the company, and the adoption of the contract by it. This contract recited the purchase by the syndicate on Aug. 30, but did not name the price then given. The price to the new company was to be £110,000, of which £80,000 was to be paid down, and the remaining £30,000 to be satisfied by fully paid-up shares in the new company. The money was to be obtained by the subscriptions for the shares, which were to be 13,000 in number of £10 each.

The five persons specified in the articles as directors were all named by the syndicate. Two of them were persons not likely to act, and who did not act, in the early proceedings of the board. The other three were Evans, Macdonald and Dakin. Evans' shares were given to him by Erlanger. Macdonald held shares only as trustee for Erlanger. Dakin had not sufficient knowledge of the facts to form an independent judgment. The first meeting of the directors was held Sept. 29, 1871; and was attended by Evans, Macdonald and Dakin. It was resolved that the contract of purchase for £110,000 "be approved and confirmed." A prospectus was soon issued; and after its publication the number of applications for shares became considerable.

There was never any confirmation of the purchase by vote of the stockholders.

Subsequently, after new directors had been chosen, the bill in this suit was filed by the company against Erlanger and all the members of the syndicate; one prayer being that the contract of Sept. 20 might be set aside; and the purchase money repaid to the company.

The case was heard before Vice Chancellor Malins, who ordered the bill to be dismissed, but without costs. On appeal by the company, the contract was ordered to be rescinded as to all members of the syndicate, the purchase money paid by the company repaid, and, on payment of the money so ordered to be repaid to the company, the island was to be restored by the company to the syndicate.

Erlanger *et als.* then brought the present appeal to the House of Lords.

The case was twice argued.

*Southgate*, Q. C., and *Benjamin*, Q. C. (*Ingle Joyce* with them), for appellants.

*J. Napier Higgins*, Q. C., and *Davey*, Q. C. (*Alexander Young* with them), for respondents.

LORD PENZANCE. [After stating the facts.]

Can a contract so obtained be allowed to stand? The bare statement of the facts is, I think, sufficient to condemn it. From that statement I invite your Lordships to draw two conclusions: first, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and, secondly, that this result was *brought about by the conduct* and contrivance of the vendors themselves. It

was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing they used that power and opportunity for the advancement of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were, as it seems to me, bound according to the principles constantly acted upon in the Courts of Equity, if they wished to make a valid contract of sale to the company, to nominate independent directors and fully disclose the material facts. The obligation rests upon them to shew they have not made use of the position which they occupied to benefit themselves; but I find no proof in the case that they have discharged that obligation. There is no proof that either Sir *Thomas Dakin* or Admiral *Macdonald* was aware of the price at which the property had just been brought under the authority of the Court of Chancery, nor, indeed, that they even knew that the real vendors were also the promoters of the company. And there is certainly no proof that in the selection of the directors who were to be the company's agents for accepting and affirming the proposed purchase, the vendors used their power as promoters in such a way as to create an independent body capable of acting impartially in defence of the company's interests.

A contract of sale effected under such circumstances is, I conceive, upon principles of equity liable to be set aside.

The principles of equity to which I refer have been illustrated in a variety of relations, none of them perhaps precisely similar to that of the present parties, but all resting on the same basis, and one which is strictly applicable to the present case. The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relation and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position, the burden of shewing that he has not used it to his own benefit.

I have no difficulty, therefore, in asking your Lordships to assent to the proposition of the Lord Chancellor, that if, within a proper time after the completion of this purchase, a bill had been filed by the company, the purchase must have been set aside.<sup>1</sup>

<sup>1</sup> As to the liability of promoters if the holders of all the stock then outstanding approved the sale, see *Old Dominion Copper Co. v. Lewisohn*, p. 570, *infra*, and the note at the bottom of p. 592, *infra*.

Irregular act by Dir: n. necessary void. It is like an act, a joint action, or viol<sup>n</sup>. this act  
may be ratified 110/332. If irregular act is w<sup>th</sup> scope, the incidental or collateral  
act is as to parties w<sup>th</sup> n<sup>o</sup>. limit no B. g. unrecorded (Lamb 6906) AC 196, 202  
and party has a right to presume act is regular

402

ROYAL BRITISH BANK v. TURQUAND.

A Co's charter provided that corp seal sh<sup>d</sup> be affix<sup>d</sup> to any instr<sup>u</sup>ment except on  
order of directors with their undersignature. A pay<sup>ment</sup> order was issued signed  
by 3 Dir: & countersigned by 1 Dir. Co was held bound by this no previous order  
for affix<sup>d</sup> seal had been given by Dir: 23<sup>rd</sup> 6<sup>th</sup> 1853. Pay<sup>ment</sup> holder can  
have recover<sup>y</sup> if pay<sup>ment</sup> had been signed by less than 3. 2 Ex 711

CHAPTER II.

Indur<sup>ation</sup> of act on infunct. '06 29 March 290  
Indur<sup>ation</sup> in emb<sup>odiment</sup> of corp 07 29 059

DIRECTORS.

(A) Unauthorized Action by de jure Directors.

101. ROYAL BRITISH BANK v. TURQUAND.

1856. 6 Ellis & Blackburn, 327.

THE plaintiffs declared against the defendant, as official manager of  
Cameron's Coalbrook Steam, Coal, and Swansea and London Railway  
Company, according to The Joint Stock Companies Winding up Acts  
(the company being completely registered under stat. 7 & 8 Vict. c.  
110). The declaration alleged that the company, before defendant  
became official manager, to wit, on 6th March, 1850, by their writing  
obligatory, sealed with their common seal, acknowledged themselves  
to be held and firmly bound to plaintiffs in 2000*l.*, to be paid to plain-  
tiffs on request; for which payment the said last-mentioned company  
did bind themselves and their successors. Yet the said sum, or any  
part thereof, has not been paid.

Plea (1), in which was set out the condition, which appeared to be  
for securing to the plaintiffs, who were bankers, such sum as the com-  
pany should, to the amount of 1000*l.*, owe to plaintiffs on the balance  
of the account current, from time to time, and for indemnifying plain-  
tiffs to that amount from losses incurred by reason of the account  
between plaintiffs and the company. The plea further set out clauses  
of the registered deed of settlement of the company, by which it ap-  
peared that the directors were authorized, under certain circumstances,  
to give bills, notes, bonds, or mortgages; and one clause provided that  
the directors might borrow on bonds such sums as should, from time  
to time, by a general resolution of the company, be authorized to be  
borrowed. The plea averred that there had been no such resolution  
authorizing the making of the bond, and that the same was given and  
made without the authority or consent of the shareholders of the  
company.

The plaintiff demurred to the plea, and JERVIS, C. J., said on this  
point: It seems to us that the plea, whether we consider it as a con-  
fession and avoidance or a special *Non est factum*, does not raise any  
objection to this advance as against the company. We may not take  
for granted that the dealings with these companies are not like deal-  
ings with other partnerships, and that the parties dealing with them

In *Hutton v. Co.* 4 Kettie 880.4. Referring to a notice of a general meeting it said: That no law  
involutes of one or regular Co. who is published to work. But this is from that general meeting  
must be summoned in the particular way the firm remains whether they are  
bound to inquire & satisfy as whether a particular general meeting for a purpose, passing  
a resolution under which directors are acting was so summoned. Should it be perfectly  
clear law & they are not bound to inquire but on the contrary & they are entitled to  
KUSER v. WRIGHT. 403

are bound to read the statute and the deed of settlement. But they assume & every  
are not bound to do more. And the party here, on reading the deed has been regular  
of settlement, would find, not a prohibition from borrowing, but a per-ly done in a sum  
mission to do so on certain conditions. Finding that the authority moving a meeting  
might be made complete by a resolution, he would have a right to at which resolution  
infer the fact of a resolution authorizing that which on the face of the was passed.  
document appeared to be legitimately done.

POLLOCK, C. B., ALDERSON, B., CRESSWELL, J., CROWDER, J., and  
BRAMWELL, B., concurred.

Principle protects officers & Co. (14 N. 305); *Shib. & Co.* 10 B. & C. 78; 5 M. & C. 297.  
Not due as 19 Dec. 97; 107 *et* 24 Pac 817

Judgment affirmed.

### (B) De Facto Directors.

### KUSER v. WRIGHT.

1894. 52 N. J. Eq. 825.

VAN SYCKEL, J. The Ott & Brewer Company was organized under  
the laws of this state, with three directors, viz., Brewer, Tucker, and  
Bell.

In June, 1891, Bell made an assignment for the benefit of creditors,  
and soon after that left the state.

In November, 1891, the Ott & Brewer Company, by the two direc-  
tors, Brewer and Tucker, executed a mortgage on its real estate and  
certain goods and chattels, to the First National Bank of Trenton, to  
secure a preëxisting indebtedness. This mortgage was recorded as a  
real estate mortgage, but was not sworn to or recorded as a chattel  
mortgage.

In August, 1892, the said company, by the same two directors, exe-  
cuted three several chattel mortgages to Anthony R. Kuser, John L.  
Kuser, and Albert Brewer respectively, to secure to each of them the  
sum of \$5000, at that time loaned by them to the said company.

In May, 1893, a bill was filed in the court of chancery, alleging that  
the said "The Ott & Brewer Company" was insolvent, and thereupon  
John Wright was appointed receiver of the said company.

The receiver exhibited his bill to set aside all these mortgages.

The alleged infirmity, chiefly relied upon, is that two directors had  
no power to establish a lien upon the property of the corporation.

Our act concerning corporations, section 16, provides —

"That the business of every such corporation shall be managed and  
conducted by the directors thereof, who shall respectively be share-  
holders therein."

Section 17 provides: —

"The directors shall not be less than three in number, and they  
shall be chosen annually by the stockholders at such time and place  
as shall be provided by the by-laws of the company, and shall hold

their office for one year, and until others are chosen and qualified in their stead."

Section 20 provides that —

"when any vacancy occurs among the directors, or secretary, or treasurer, by death, resignation, removal, or otherwise, it shall be filled for the remainder of the year in such manner as may be provided for by the by-laws of the said company."

Section 47 provides that —

"it shall not be lawful for any person to be elected a director of any body corporate in this state issuing stock unless that person shall be, at the time of his election, a *bona fide* holder of some of the stock thereof."

Section 48 provides that —

"when any person, a director of any body corporate, shall cease to be a *bona fide* holder of some of the stock thereof, he shall cease thereupon to be a director thereof."

The point made against these mortgagees is that under our statute there must be at least three directors to manage the corporate business; that by the assignment made by Bell for the benefit of his creditors he ceased to be a stockholder, and by force of the statute ceased at the same time to be a director of the company, thereby leaving the corporation without a board of directors legally qualified to conduct its affairs.

That such a result justly or legally flows from these premises cannot be conceded. It is apparent that dealing with these corporate bodies would be in the highest degree hazardous and unsafe if the public, without notice in fact, is chargeable in law with knowledge of a latent infirmity in the title of every director of the company. A doctrine so destructive to the security of commercial transactions, now so largely conducted by corporate action, has no support in the law. The receiver stands for the corporation, and cannot impeach any act which the corporation itself could not successfully assail.

Bell's original title to the office of director was good; it is not denied that he was legally elected. The corporation held him out to the public as one of its duly-authorized agents by failing to declare his office vacant and electing his successor.

In *Doremus v The Dutch Reformed Church*, 2 Gr. Ch. 349, Chancellor Vroom said "that where the original title of an officer is sufficient, though good cause of amotion be shown, even in a case where the charter declares that for such cause of amotion the officer shall vacate his office, the office is not determined until there be an amotion."

He also said "that where persons are officers *de facto* they are in *colore officii*, and their acts will be valid until they are lawfully ousted, and more especially as they respect third persons they are binding on the corporation."

The authorities are cited in the opinion.

This rule has never been departed from in this State.

Vice-Chancellor Van Fleet, in *Mechanics' Bank v. Burnet Company*, 5 Stew. Eq. 236, adopted it. He there declares "that if the officers selected are ineligible or are elected irregularly or illegally, but are allowed by the proprietors of the corporation to take control of its property, and to exercise its functions and powers, they become officers *de facto*, and as such may act for and bind the corporation. An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.

"From a very early time it has been held that the acts of *de facto* officers are binding upon the corporation until they are lawfully ousted, especially so far as their acts create rights in favor of third persons."

That such is the current of authority will appear by reference to the books. *Mining Company v. Bank*, 104 U. S. 192; *Beach Corp.* §§ 233, 234; *Ang. & A. Corp.* § 287.

In *San Jose Savings Bank v. Sierra Lumber Company*, 63 Cal. 179, a director who had ceased to be a stockholder, no judgment of ouster having been pronounced against them, was held to be a director *de facto*, and his acts valid as to third persons.

Mr. Taylor, in his book on Private Corporations, §§ 187, 188, after stating the rule as formulated in the cases above cited, says that—

"It is submitted that this statement of the rule does not give sufficient prominence to the principle of estoppel, on which the rule depends; a principle which, in its application to the responsibility of corporations for the acts of *de facto* officers, may be stated thus: If a body of men, acting as a corporation, permits certain persons to act openly as corporate officers, or if it is permitted by the directors, assuming them to have had the power to appoint the officer in question, the corporation will not, to the detriment of persons who, in good faith, have acted on the assurance that the persons acting as officers were the officers they assumed to be, be permitted to impeach the validity of their acts and contracts on the ground that such persons were not legally corporate officers."

*Bottomley's Case*, L. R. 16 Ch. Div. 681, is not in conflict. In that case the contest was between the company and its own stockholders. Five directors were necessary to conduct the business. After one became disqualified by insolvency, the other four took proceedings by which they attempted to enforce a forfeiture against some of their stockholders.

Sir George Jessel, master of the rolls, held that the shareholders were entitled to have the business of the company conducted according to the articles of the association in relation to that proceeding. As between stockholders and the company, that was the correct rule.

In *In re Country Life Assurance Company*, L. R. 5 Ch. App. Cas. 288, a policy signed by three *de facto* directors of the company was enforced in favor of the party insured.

Those dealing with a corporation are permitted to act as directors who have color of right to & are entitled to assume all rights of law & Co's regulation in respect to their election have been complied with. LR 122 869 (public pol requires acts, and acts done should be overturned because some later discover defect in their appt.)

a | Lord Justice Giffard observed, in delivering his judgment, that he did not hesitate to say that the business of companies could not be carried on if this was not held to be the law.

As to the public, Bell was clearly a director *de facto*, and the corporation was represented in the affair before us by three directors, as required by the statute.

This court has adjudged that, as in favor of creditors and third persons dealing with a corporation in good faith, the regularity and validity of its organization, effected under color of its charter, cannot be impeached, and the acts of its officers, who are officers *de facto* under color of an election, are binding on the corporation. *Hackensack Water Co. v. De Kay*, 9 Stew. Eq. 548.

A majority of the directors of a corporation, in the absence of any statutory regulation, is a quorum, and such majority, when convened, can do any act within the power of directors. *Wells v. Railway Rubber Co.*, 4 C. E. Gr. 402.

Under these cases, the fact that no notice of the meeting of directors, at which the mortgages were authorized, was given to Bell cannot affect the validity of these securities. That is a subject into which those who are dealing with a corporation are not bound to inquire. That duty falls on the company alone when it holds out its officers as its accredited agents. Nothing like an approach to safety could exist in transactions with corporate bodies if such an obligation was laid upon third parties contracting with them. After the most careful inquiry, the question would still be open to controversy.

The assignment by Bell for the benefit of creditors was not constructive notice to the appellants that he had ceased to become a shareholder. Actual notice must be shown, and that was not proven.

Those only are chargeable with constructive notice of the assignment who seek to establish a title to his individual property.

The company is estopped from denying the authority of one who is, *de facto*, a director, and in that capacity authorized to represent it.

The fact that the mortgage to the bank was executed to secure an antecedent debt does not impair its standing as between the corporation and its creditor. It was taken in good faith, and it was as much the duty of the company to pay the debt as though it had been contracted at the date of the mortgage. *Knowles Loom Works v. Vacher et al.*, Supreme Court, February Term, 1895.

So far as the mortgage to the bank is a lien upon personal property, it must be postponed to the chattel mortgages, because the bank failed to record it as a chattel mortgage. The decree below should be reversed, with costs in this court and in the court below, and the securities of the appellants established in accordance with the views herein expressed.<sup>1</sup> *104 US 192 (Cal) 124/169; 122/129.*

<sup>1</sup> In *Waterman v. Chicago R. R. Co.*, 139 Ill. 658, the court said, p. 665: A *de facto* officer is distinguished on the one hand from a mere usurper of an office, and on the other hand from an officer *de jure*. He is one who is in actual possession of an office under the claim

Doctrine applies vs Co even in favor of own sub (of 9 Dec 80) officers (44 Mo 154; 57 At 417)  
But in Eng (from principle) Co in matters internal may right n (allotted to rely on  
acts de facto dir as vs opposit. sub who have agreed to hold de jure dir, elected  
officers. 54 M 181; 1 Q. 39. 14 May 44 U. 2. 84 Ala 618; 21 Utah 258. calls & popular  
& abundant contra 101/70.80. 91 P 273 (Utah)

2. (ch) 57. acts - a very abn. case of fraud or neglect must be estab<sup>d</sup>. for U.V. rule out  
acts - always has to corp for any & thereby suffer. U.V. = U.V., due not necess<sup>y</sup>. Co  
60/12.6.

(c) Liability of Directors for Action or Inaction.

→ 8 March 1837

1- To the Corp (for U.V. act).

LEEDS COMPANY v. SHEPHERD.

1887. L. R. 36 Ch. Div. 787.

STIRLING, J. There appears to me to be a fundamental difference between the two classes of acts in respect of which it is sought to fix the defendants with liability. It is now settled by decisions of the House of Lords and Court of Appeal that the capital of a company formed under the Act of 1862 can be legally applied only for the purposes specified in the articles of association. The capital may be lost in the course of such application, and creditors or other persons dealing with the company must take that risk; but they are entitled to act on the faith that no part of the capital will be applied to any other purpose, and in particular that no part of the capital will be returned to the shareholders except in the cases and under the safeguards in and under which a reduction of capital is permitted by the various Acts of Parliament.

Among the objects for which the present company was formed was the lending of money on security; and the acts of the directors with reference to any advances they made were within the powers of the company: but if (as is alleged) they paid dividends out of capital, their acts in this respect were beyond the powers of the company and contrary to law.

It has now been decided that directors are trustees or quasi trustees of the capital of the company, and are liable as trustees for any breach of duty as regards the application of it; but when such liability is sought to be enforced, it has to be determined on the facts of each particular case whether a breach of duty has been committed.

Now it is obvious that the duties of the directors of a trading company with reference to advances on security made in the course of conducting the business of a company formed for the purpose of making such advances, are totally different from those (for example) of the trustees of a settlement. The funds which form the subject of a settlement are intended to be preserved for the benefit of those who

and color of an election or appointment, and is in the exercise of its functions and in the discharge of its duties. In *Angell & Ames on Corporations* (sec. 287), it is said: "The best definition we have seen of an officer *de facto* is that given by Lord Ellenborough in *The King v. The Corporation of Bedford Level*, 6 East, 368." That definition is this: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." In *Vaccari v. Maxwell*, 3 Blatchf. 368, the court says: "We think, however, that the decisions in relation to the acts of officers *de facto* are reasonably to be restricted to those who hold office under some degree of notoriety, or are in the exercise of continuous official acts, or are in the possession of a place which has the character of a public office." In *State ex rel. Corey v. Curtis*, 9 Nev. 325, it is said: "In order to make a person an officer *de facto*, the law requires that he should in some way be put into the office, and that he should also have secured such a holding thereof as to be considered really in peaceable possession and actually exercising the functions of an officer."

\* Don hold legal title to corp prop. - 168 N.Y. 157, 164; 53 Md. 419, 36

\* When directors are spoken of by judges as off trustees or managers etc. Co

it is essential to recollect & such expressions are used n. as exhaustive & persons or responsibilities of those persons but only as indicate useful pts. view & wh. they may, for circumstance & for particular purposes be considered - pts. view at wh. they seem not meant to be either cutting round or falling in category of principles kind. It is not meant to be a conclusion but it is useful to know.



may successively become entitled to them, and it is the duty of trustees making advances out of such funds to take care that the securities they obtain are such as will expose the beneficiaries to as little risk of loss as may be. The funds embarked in a trading company, on the other hand, are placed under the control of the directors in order that they may be employed for the acquisition of gain, and risk (greater or less, according to circumstances) is of the very essence of such employment. When the advance of money on security is one of the objects of such a company, the acts of directors with reference to the advances are to be judged, not by the rules which have been laid down as to the investment of settled funds, but (more nearly at all events) by those which regulate the duties of the managing partners of an ordinary trading firm as between themselves and those partners who do not take an active part in the conduct of the firm's business.

Accordingly, it is settled by such cases as *Overend & Gurney Co. v. Gibb*<sup>1</sup> and *Turquand v. Marshall*<sup>2</sup> that directors are not to be made liable for loss occasioned by mere imprudence or error of judgment in the exercise of the powers conferred on them. The case sought to be made against the defendants with regard to the advances complained of falls within this rule, and, indeed, after the evidence on behalf of the plaintiff was given, this head of complaint was abandoned by the plaintiff's counsel, and so much of the action as relates to it must be dismissed.

The case as regards the payment of dividends out of capital stands in a very different position, and the law as regards it is perhaps not yet completely settled. It follows from the decisions in *In re National Funds Assurance Company*<sup>3</sup> and *Flitcroft's Case*<sup>4</sup> that directors who make such payments, either with actual knowledge that the capital of the company is being misappropriated or with knowledge of the facts which establish the misappropriation, are liable as for a breach of trust. The present case does not fall within those which I have just mentioned, for I am unable on the evidence before me to arrive at the conclusion that the directors had actual knowledge of the real state of the company's affairs. I have, however, the guidance of the recent judgment of Mr. Justice Kay in *In re Oxford Benefit Building and Investment Society*,<sup>5</sup> a case which was much—I may almost say exclusively—relied on by the counsel for the plaintiff, and which, although it is not precisely identical with the present, nevertheless closely resembles it in many of its features. The judgment was given after an elaborate argument by very eminent counsel, and after full consideration by the learned judge who decided it, and it is certainly an authority not to be departed from by a judge of coördinate jurisdiction except on the clearest ground.

In that case as in the present it was contended that directors who had continually paid dividends out of capital could not be made liable

<sup>1</sup> Law Rep. 5 H. L. 480.

<sup>2</sup> Ibid. 4 Ch. 376.

<sup>3</sup> 10 Ch. D. 118.

<sup>4</sup> 21 Ch. D. 519.

<sup>5</sup> 35 Ch. D. 502.

unless their conduct amounted to fraud. "From that proposition," says the learned judge, "I must express my dissent," and he accordingly held that directors who had omitted to lay before the shareholders proper accounts of income and expenditure and balance-sheets, and who acted negligently or carelessly as regards the ascertaining of the profits which they professed to divide, were jointly and severally liable to repay the sums improperly paid out of capital by way of dividends.

It was, however, contended on behalf of the defendants that the case of *In re Oxford Benefit Building and Investment Society*<sup>1</sup> was inconsistent with previous decisions which were binding on me, and in support of that proposition there were cited *Overend & Gurney Co. v. Gibb*,<sup>2</sup> *Turquand v. Marshall*,<sup>3</sup> and other cases of the same class. These, however, are distinguishable on the ground that, as I have already endeavored to point out, they relate to acts within the powers of the directors, and not to acts (such as payment of dividends out of capital) which are beyond the legal powers of the directors or of the company. The law prohibits the payment of dividends out of capital, and it may well be that directors are called upon to exercise greater care when they are in danger of violating such prohibition than when they apply the capital for purposes unquestionably within the objects of the company. So, if a company were formed for the purpose of working a mine, it might be the duty of those engaged in superintending its operations to exercise greater care when they approach their neighbor's property and are in danger of committing a trespass than when the scene of action is undeniably within the boundaries of the company's property. . . .

It seems to me that the views expressed by the learned judges who decided *Rance's Case*<sup>4</sup> are consistent with the proposition that directors who are proved to have in fact paid a dividend out of capital fail to excuse themselves if they have not taken reasonable care to secure the preparation of estimates and statements of account such as it was their duty to prepare and submit to the shareholders, and have declared the dividends complained of without having exercised thereon their judgment as mercantile men on the estimates and statements of account submitted to them; and if this be so, *In re Oxford Benefit Building and Investment Society*<sup>5</sup> does not, in my opinion, conflict with *Rance's Case*.

<sup>1</sup> 35 Ch. D. 502.<sup>2</sup> Law Rep. 5 H. L. 480.<sup>3</sup> Law Rep. 4 Ch. 376.<sup>4</sup> Law Rep. 6 Ch. 104.<sup>5</sup> 35 Ch. D. 502.

Here we have a case - nonfeas - failure to keep or examine accs.  
On yr an explicit duty imposed on directors by Stat or regul<sup>n</sup> to act  
in a certain way a failure is u. r. & makes liable. so all 120 acc. 28.

## HALE v. MASON.

1899. 160 N. Y. 561.

BARTLETT, J. This action was begun by the St. Lawrence Manufacturing Company in the early part of 1891, to recover damages of the defendant, who was one of the trustees of the company, by reason of his alleged misconduct, which prevented the consummation of contracts that would have proved of great value to the company.

This corporation had its general office and factory at Gouverneur, St. Lawrence County, and its business consisted in manufacturing agricultural implements, principally disc harrows and wagons and their attachments.

The transaction covered by this litigation took place principally in the year eighteen hundred and ninety.

It is established by uncontradicted evidence that the annual report of the directors to the stockholders on the 1st of January, 1890, disclosed that the capital of the company was materially impaired and during the years 1888-89 very serious losses had been made.

In a letter that Corbin, the president of the company, addressed to the defendant on the 10th of April, 1890, he said, among other things: "I do not hesitate to tell you that the outlook is not sufficiently promising here to warrant me in spending the most valuable years of my life in trying to work out a profit for my friends. The past eight weeks has been a revelation to us all. The bottom of the disc harrow trade seems to have dropped out entirely throughout the eastern states. The market has been flooded with cheap instruments, and the agents from every establishment in the country swarm over our disc harrow district long before we could get at it, and we are going to experience great difficulty in unloading even one half of the machines that we have ready for the market."

Under these discouraging circumstances, it was discussed by the board of directors whether it would not be wise to transfer the business of the corporation to some western state, where manufacturing could be conducted under more favorable conditions and the market more readily reached.

The result was that a resolution was passed April 2, 1890, appointing the president of the plaintiff company and Mr. Mason, the defendant, a committee to find the best terms that could be made for this removal.

Shortly before this, a contract had been drafted between the East Omaha Land Company and the plaintiff corporation, subject to the ratification of the stockholders of the latter, which provided in substance that the land company would donate to the manufacturing company five acres of land for the purpose of locating its business, trackage facilities connecting their factory with the Union Pacific

Railroad, and money to the extent of ten thousand dollars, for the purpose of moving its plant and erecting its buildings.

While the defendant is charged with having prevented the execution of this contract, the evidence shows that the stockholders of the plaintiff never ratified the contract, and that it was voluntarily abandoned by the company for the reason that a more advantageous agreement was secured later at Minneapolis, in the State of Minnesota.

On the 23d of April, 1890, four individuals, as parties of the first part, made a contract with the plaintiff corporation, as party of the second part, which in substance provided that they would donate five acres of land for building purposes, trackage facilities from railroad to factory, and a cash bonus of thirty thousand dollars, paid in specified instalments, five thousand dollars of which was paid down at the time of the execution of the contract. This five thousand dollars was paid to Corbin, the president of the company, who conducted the Minneapolis negotiations from beginning to end.

It seems that the defendant was the owner of lands in the neighborhood of the real estate that was to be benefited by the contract with the East Omaha Land Company, and his associates in the ownership of adjacent land were of opinion that he should contribute his fair share to the bonus that was to be paid to the plaintiff company. To this the defendant made objection, and it seems to have been, to some extent, an obstacle to further negotiations. He offered to turn in, as a payment of his share of the bonus, certain lands that he owned in that locality, but his figures were deemed too high.

It also appears that he had originally made an agreement with Corbin, the president of the plaintiff company, by which he was to receive a bonus from his own company of \$3200.00 if the arrangement went through.

When the defendant was advised that the Minneapolis deal was closed he immediately wrote to Corbin, who had returned to the State of New York, that he would expect the same bonus in the Minneapolis matter that had been promised him in the Omaha contract.

Corbin replied that there was no basis for such a claim on the defendant's part, and this circumstance led to a bitter quarrel between Corbin and the defendant, which appears in the evidence, both in correspondence and personal interviews.

In substance it came to this: That the defendant Mason said that Corbin had imposed upon the Minneapolis parties by false statements as to the condition of the New York corporation, and that the deal could never go through if the Minnesota parties knew the exact truth in regard to the matter.

He further stated to Corbin that he felt it was his duty in the premises, as many of his friends in Minnesota were interested in the matter, to advise them that they had better send an expert east and look into the true condition of the plaintiff company. This he did, and an expert named Boshart was sent down to Gouverneur; but, as he

seemed to be in the interest of Mason, and was not duly accredited in the estimation of the company's officers, he was refused access to the books and factory of the corporation. He returned to Minnesota, and later Corbin visited Minneapolis and had an interview with the parties who had executed the contract with him, in which he stated that his representations were not false or fraudulent, and he trusted the contract would be carried out; that the company was ready to perform on its part.

He also stated that he was willing to pay the expenses of an expert to come east and examine the general condition of the company. Matters were held in suspension at this point, and an expert named Allen was sent to Gouverneur and spent over a week in examining the machinery and books of account of the company. Allen was an expert in the carriage manufacturing business, as well as an accountant. On his return to Minneapolis, he made a report to the parties in interest there, which was exceedingly unfavorable, and showed that Corbin's representations were not wholly trustworthy. For instance, he found figures that had been placed upon the book accounts were far too high, and that accounts that had been charged off to profit and loss were revived and put among the live assets; that the machinery account that stood at \$12,000 should be reduced to \$3500, much of the machinery being old and valueless; instead of a thousand wagons having been sold by the plaintiff company, he thought the number should be reduced to two hundred or two hundred and fifty, and as to the patent account covering the disc harrows, he found that licenses had been disposed of for the central states to a concern in Illinois, and the same was true of very large interests on the Pacific coast; he also found that Corbin's representations as to the value of the particular kind of wagon manufactured by the company were exaggerated, and that a steel axle, which was claimed to be a valuable feature of it, was not a practical thing from a mechanical standpoint.

Without going further into detail, he summed up that to take this eastern company would mean, practically, that they had to run it and furnish the capital to keep it going, and get no benefit of the transaction, except to dispose of certain lands in the neighborhood of the factory. He afterwards added that the real estate that Corbin had valued at \$8000 in Gouverneur only cost the company about \$4000; he also stated that he was not influenced in this report in any way by the action of the defendant.

The result of this report led to an abandonment of the Minnesota contract, the parties of the first part refusing to go on with the performance of it, on the ground that they had been deceived as to the real condition of the eastern company. A subsequent effort was made to get the parties together in a new contract, but it failed.

It was after these transactions that the company, before it passed into the hands of a receiver, who now represents this litigation on its behalf, decided to bring this action against the defendant for \$53,000,

damages, by reason of having prevented the execution of these contracts.

At the close of all the evidence the defendant's counsel moved for a nonsuit on six distinct grounds, only one of which need be noticed, as the learned trial judge placed his granting of the motion on that particular ground, to wit, that there is no proof that the defendant performed any act preventing the execution of the contract, Exhibit "B," with the Minneapolis parties.

The trial judge had previously suggested that the contract with the East Omaha Land Company had been voluntarily abandoned by the plaintiff company, and that the sole issue in this case was under the Minneapolis agreement.

It must be admitted that this record is not particularly creditable, either to the president of the company or to this defendant. The former is shown to have concealed the truth in regard to this well-nigh moribund corporation, and the defendant seems willing to have done the same thing if his bonus of \$3200 had been paid him under the Minnesota contract. Nevertheless, it was due to the defendant's suggestion that the affairs of the plaintiff company were examined by the parties to the Minnesota contract.

As matter of honest business dealing the defendant performed only an obvious duty when he advised the Minnesota parties that material facts in regard to the condition of the plaintiff company had been concealed from them, and it seems perfectly clear that the report of Allen, the second expert, resulted in the abandonment of this contract, and that no act of the defendant can be regarded in law as the proximate cause of this result.

*Judgment affirmed.*

## SPERING'S APPEAL.

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1872. 71 Pa. State, 11.

THE National Safety Insurance and Trust Company became insolvent in the winter of 1860-1861, and losses to a large amount were sustained by its depositors. They made an assignment for the benefit of creditors on the 18th of April, 1861, to Henry L. Benner, and others. Spering, the plaintiff, was afterwards appointed trustee in their place. This bill was brought by the trustee to compel the directors and others, alleged to be connected with them, to make good the losses, on the ground of fraudulent mismanagement.

SHARSWOOD, J. — This bill was filed by the appellant as the assignee of the "National Safety Insurance and Trust Company," against the defendants, who were directors of the corporation, alleging fraudulent, illegal and improper management of its affairs, extending over a period of more than ten years, from 1850 to 1861. The case upon the bill, answers and proofs was referred to a Master, who reported that the bill should be dismissed and a *pro forma* decree was entered accordingly.

Upon a careful examination of the record and paper-books, which make up nine hundred and sixty-six printed octavo pages, we have come to the following conclusions of fact, which are supported also by the opinion of the Master. First, That no fraudulent conduct is imputable to any one of the defendants, at any period of time during their administration of the trust. No pecuniary advantage, to the amount of a dollar, was ever realized or sought by any one of them. There was no embezzlement or misappropriation of the funds by any officer or agent of the corporation. There is no pretence that the defendants are liable to account upon either of these grounds. "One fact," says the Master, "is quite clear — that none of the defendants have made any profit out of their transactions which was not common to all the stockholders." Second, That in regard to investments, and the mode of transacting the business — the legality of which under the charter is questioned — the defendants uniformly acted under legal advice. "It appears in the evidence," says the report, "that the defendants always acted upon legal advice, as to the mode of doing business and making investments. No important step was ever taken without first obtaining the advice of the solicitor." Third, Looking at the history of the institution in the light of subsequent events, its direction was unwise and unfortunate. The money of the depositors was not invested in first-rate and perfectly safe securities, as they engaged to do, and as the funds of such a charity unquestionably ought to be. Loans were largely made upon very doubt-

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ful collaterals. Their investments in real estate were injudicious. They lost from a failure to insure. They sought to realize large profits at usurious rates of interest. The crash came in 1860, just before the breaking out of the civil war. All doubtful securities fell in the market. Their debtors went to the wall. In the vain attempt to sustain their credit they sacrificed securities and collaterals. Had they stopped and made an assignment at once, a large amount of the loss which subsequently fell upon them would undoubtedly have been prevented. The story might be much amplified by entering into a detail of particulars: but the conclusion would be the same. Such is a brief résumé of the facts. It is not the history of this institution alone, but of many others in this country.

The broad question then is, whether upon such a state of facts, the directors of a corporation can be made to account for losses arising from mismanagement merely. *gn*

It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are undoubtedly said in many authorities to be trustees, but that as I apprehend is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandatories — persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more. Indeed, as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration, their best judgment and skill. Ought they to be held responsible for mistakes of judgment or want of skill and knowledge? They have been requested by their co-stockholders to take their positions, and they have given their services without compensation. We are dealing now with their responsibility to stockholders, || not to outside parties — creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many *dicta* not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that their responsibility is limited to these cases, and that there might not exist such a case of negligence or of acts clearly ultra vires, as would make perfectly honest directors personally liable. But it is evident that gentlemen elected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were

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such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places. The authorities I think fully endorse these views.

The leading case is *The Charitable Corporation v. Sutton*, 2 Atk. 400, which was treated by Lord Hardwicke as a case of fraud entirely. Five of the managers or committee-men entered into a confederacy to loan out money to their own storekeeper, upon whom was devolved the duty of putting an estimate upon the value of the pledges; the others connived at the fraud. "It is such a notorious fraud or at least gross inattention," said the Lord Chancellor, "to suffer him, who was to set a value on all the pledges, to borrow money upon them himself, that I shall direct those who appear to be guilty of it to make good the loss. Committee-men are most properly agents to those who employ them in the trust and who empower them to direct and superintend the affairs of the corporation. If some persons are guilty of gross non-attendance and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others." So accordingly in *The York and North Midland Railway Company v. Hudson*, 16 Beavan 495, the chairman of a railway company appropriated unallotted shares to the use of various persons, whose names he did not mention, in order to secure or reward services which he declined to state, but which it was insinuated was in the nature of "secret service money;" it was held that if the defendant had applied the property of the company in a manner which would not bear the light, he must suffer the consequences, and that being charged with the receipt of the money, he could not discharge himself by the suggestion of such an application. In *Williams v. Page*, 24 Beavan 661, Sir John Romilly said, in treating a director as a trustee: "The trust no doubt is a peculiar one." In *Great Luxembourg Railway Co. v. Magnay*, 25 Beavan 592, he held that if a director enters into a contract for the company he cannot personally derive any benefit from it. So also in *Ex parte Bennett*, 18 Beavan 339, directors of a public company are trustees for the shareholders, and their private interests must yield to their public duty wherever they are conflicting. In *Turquard v. Marshall*, 3 Equity (Law Rep.) 127, which is the last English case on the subject, Lord Romilly, M. R., held directors liable, first, for not calling a meeting of the shareholders under a clause of the charter requiring them to do so, on the exhaustion of their surplus fund, and second, for loaning money to one of themselves without security. He used however this language: that if directors have been guilty of gross and palpable breach of trust, which cannot be set right by a public meeting of the company, they may be made responsible for their misconduct. On appeal, however, the decree of Lord Romilly, holding the directors personally liable, was reversed by Lord Chancellor Hatherley, 4 Chancery Appeals (Law Rep.) 386. He said: "There was no fraud alleged, nor was it alleged that the directors applied the

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strictly no rule

funds of the company to their own use, or in any way except in what they thought was for the benefit of the company, however incorrect their course might have been." Then as to the loan to Higgins (the co-director): "The statement of this in the bill was only as part of the general misconduct of the directors, and the loan was only mentioned as one of the losses incurred. There was no specific allegation of any impropriety in lending the money to him, nor was any specific relief prayed in this respect. It was within the powers of the deed to lend to a brother director, and however foolish the loan might have been, so long as it was within the powers of the directors, the court could not interfere and make them liable. They were intrusted with full powers of lending the money, and it was part of the business of the concern to trust people with money, and their trusting to an undue extent was not a matter with which they could be fixed, unless there was something more alleged, as, for instance, that it was done fraudulently and improperly and not merely by a default of judgment. Whatever may have been the amount lent to anybody, however ridiculous and absurd their conduct might seem, it was the misfortune of the company that they chose such unwise directors; but as long as they kept within the powers of their deed, the court could not interfere with the discretion exercised by them."

To pass now from the English to the American cases: *Koehler v. The Black River Falls Iron Co.*, 2 Black S. C. 715, was a case of fraud. Mr. Justice Davis said: "Instead of honestly endeavoring to effect a loan of money advantageously for the benefit of the corporation, these directors, in violation of their duty and in betrayal of their trust, secured their own debts to the injury of the stockholders and creditors. Directors cannot thus deal with the important interests intrusted to their management. They hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation." In *Scott v. Depeyster*, 1 Edw. Ch. Rep. 513, the object of the bill was to make the directors liable for money embezzled by their secretary on the ground of their negligence. So, in *Robinson v. Smith*, 3 Paige 222, the bill alleged that the directors had engaged in a gambling speculation in stocks, wholly unauthorized by the charter, which was carried on to subserve their own individual interests and purposes. On demurrer to the bill, it was of course held that the directors of a corporation, who wilfully abuse their trust or misapply the funds of the company by which a loss is sustained, are personally liable as trustees to make good that loss, and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust. In the same category is *Taylor v. Miami Exporting Company*, 5 Hammond (Ohio) 162; *Verplanck v. Mercantile Insurance Co.*, 1 Edw. Ch. Rep. 84; *Bank of St. Mary v. St. John*, 25 Alab. N. S. 566; *Butts v. Wood*, 38 Barb. 181; s. c. 37 New York 317. In *The Franklin Fire Insurance Co. v.*

*Jenkins*, 3 Wend. 130, which was an action on the case in which the declaration alleged against directors "want of care and attention," and also "corrupt and wilful mismanagement," a demurrer was sustained Sutherland, J., remarking: "These are very different allegations and require distinct and different answers." *Lexington & Ohio Railroad Co. v. Bridge*, 7 B. Monroe 556, was a bill by creditors against directors for making a dividend when no profits existed. "We are satisfied," say the court, "that if they were guilty of negligence to any extent it is not of that gross and palpable character that would render their conduct so reprehensible as to subject them to the imputation of a personal or even a legal fraud." In *Godbold v. Branch Bank at Mobile*, 11 Alab. 191, it was decided that the directors of a bank are not responsible for an injury to the bank caused by their act, originating in an error of judgment, unless the act be so grossly wrong as to warrant the imputation of fraud or the want of the necessary knowledge for the performance of the duty assumed by them on accepting the agency. In *Hodges v. New England Screw Co.*, 1 Rhode Island 312, in dismissing the bill, Greene, C. J., observed: "It does not appear that the directors sought or secured to themselves any benefit or advantage which was not common to all the other stockholders of the Screw Company." See also *Neall v. Hill*, 16 California 145.

It seems unnecessary to pursue this investigation any further. These citations, which might be multiplied, establish, as it seems to me, that while directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement or wilful misconduct or breach of trust for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers or co-directors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest and provided they are fairly within the scope of the powers and discretion confided to the managing body.

In regard to the question last adverted to, whether the defendants should be held responsible for any of their acts and investments as *ultra vires*, it might be sufficient to notice the fact that the charter of this corporation was a very complicated one, made up by comparing together no less than sixteen different acts of incorporation or supplements. The ingenuity of the young gentlemen of counsel for the defendants has been exercised in presenting to the court a genealogical map or pedigree, tracing the Acts of Assembly, from one to another. To have mistaken the extent of their powers under such circumstances would not have been matter of surprise even in the most timid and cautious. We may adopt upon this point the language of C. J. Greene in *Hodges v. New England Screw Co.*, 1 Rhode Island 312. "In considering the question of the personal responsibility of the directors we shall assume that they violated the charter of the

Screw Company. The question then will be, was such violation the result of mistake as to their powers, and if so did they fall into the mistake from want of proper care, such care as a man of ordinary prudence practises in his own affairs. For, if the mistake be such as with proper care might have been avoided, they ought to be liable. If, on the other hand, the mistake be such as the directors might well make, notwithstanding the exercise of proper care, and if they acted in good faith and for the benefit of the Screw Company, they ought not to be liable." We may say in this case, conceding that the directors did violate the charter, it was a question upon which with all due care they might have made an honest mistake; and moreover, it appears by the evidence, and is so reported, that they acted throughout by the advice of their counsel. It is well settled that trustees will be protected from responsibility under such circumstances: *Lewin on Trusts* 595; *Vex v. Emery*, 5 Ves. 141; *Calhoun's Estate*, 6 Watts 189.

*Decree affirmed.*

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### HUN v. CARY.

1880. 82 New York, 65.<sup>1</sup>

EARL, J. This action was brought by the receiver of the Central Savings Bank of the city of New York, against the defendants, who were trustees of the bank, to recover damages which, it is alleged, they caused the bank by their misconduct as such trustees.

The first question to be considered is the measure of fidelity, care and diligence which such trustees owe to such a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and *cestui que trust*. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage, they incur liability. If they act fraudulently or do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it

<sup>1</sup> Statement and arguments omitted. — Ed.

would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them — the same degree of care and prudence that men <sup>One</sup> prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty — *crassa negligentia* — not to bestow them.

It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. (*First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278.) What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books, not always of practical value and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care; and the claim on behalf of these trustees is that they can only be held responsible in this action in consequence of gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning — as something nearly approaching fraud or bad faith — I cannot yield to this claim; and if there are any authorities upholding the claim, I emphatically dissent from them.

It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for *crassa negligentia*, which literally

means gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case.

[The learned Judge here quoted from various authorities.]

In *Spering's Appeal*, Judge SHARSWOOD said that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." As I understand this language, I cannot assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. (Story on Bailments, § 182.) Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe-keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust.

*Not undertaken*

Enough has now been said to show what measure of diligence, skill and prudence the law exacts from managers and directors of corporations; and we are now prepared to examine the facts of this case, for the purpose of seeing if these trustees fell short of this measure in the matters alleged in the complaint.

[The bank was incorporated in 1867, and did business until 1875, when a receiver was appointed. During this time the deposits averaged about \$70,000. From 1867 to 1873 the total expenses, including interest paid to depositors, exceeded the income. In 1873 the trustees of the bank, which had hitherto occupied hired premises, purchased, in behalf of the institution, four lots of land, with a view to erecting a bank building upon one of the lots. The greater part of the purchase price was secured by mortgages on the lots. At the time of purchase the bank became obligated to erect upon the corner lot a five story building. Such a building was thereafter erected at an

expense of about \$27,000. The other lots were disposed of without loss. The corner lot had cost the bank \$29,250 (presumably its fair value), exclusive of the building. It was mortgaged for \$30,500. When the receiver was appointed, that lot and building, and other assets which produced less than \$1000, constituted the whole property of the bank, and subsequently the lot and building were swept away by a mortgage foreclosure. The present action was brought to recover the damages caused to the bank by the alleged improper investment of its funds, as above stated.<sup>1</sup>]

At the time of the purchase of the lot, the bank was substantially insolvent. If it had gone into liquidation, its assets would have fallen several thousand dollars short of discharging its liabilities, and this state of things was known to the trustees. It had been in existence about six years, doing a losing business. The amount of its deposits, which its managers had not been able to increase, shows that the enterprise was an abortion from the beginning, either because it lacked public confidence, or was not needed in the place where it was located. It had changed its location once without any benefit. It had on hand but about \$13,000 in cash, of which \$10,000 were taken to make the first payments. The balance of its assets was mostly in mortgages not readily convertible. One was a mortgage for \$40,000, which had been purchased at a large discount, and we may infer that it was not very salable, as the trustees resolved to sell it as early as May, 1873, and in August, 1873, authorized it to be sold at a discount of not more than \$2500, and yet it was not sold until 1874. In this condition of things the trustees made the purchase complained of, under an obligation to place on the lot an expensive banking-house. Whether, under the circumstances, the purchase was such as the trustees, in the exercise of ordinary prudence, skill and care, could make; or whether the act of purchase was reckless, rash, extravagant, showing a want of ordinary prudence, skill and care, were questions for the jury. It is not disputed that, under the charter of this bank, as amended in 1868 (chap. 294), it had the power to purchase a lot for a banking-house "requisite for the transaction of its business." That was a power, like every other possessed by the bank, to be exercised with prudence and care. Situated as this moribund institution was, was it a prudent and reasonable thing to do, to invest nearly half of all the trust funds in this expensive lot, with an obligation to take most of the balance to erect thereon an extravagant building? The trustees were urged on by no real necessity. They had hired rooms where they could have remained; or if those rooms were not adequate for their small business, we may assume that others could have been hired. They put forward the claim upon the trial that the rooms they then occupied were not safe. That may have been a good reason for making them

<sup>1</sup> The passages enclosed in brackets [ ] are an abridgment of the recitals of fact in the opinion of the court. — Ed.

more secure, or for getting other rooms, but not for the extravagance in which they indulged. It is inferable, however, that the principal motive which influenced the trustees to make the change of location was to improve the financial condition of the bank by increasing its deposits. Their project was to buy this corner lot and erect thereon an imposing edifice, to inspire confidence, attract attention, and thus draw deposits. It was intended as a sort of advertisement of the bank, a very expensive one indeed. Savings banks are not organized as business enterprises. They have no stockholders, and are not to engage in speculations or money-making in a business sense. They are simply to take the deposits, usually small, which are offered, aggregate them, and keep and invest them safely, paying such interest to the depositors as is thus made, after deducting expenses, and paying the principal upon demand. It is not legitimate for the trustees of such a bank to seek deposits at the expense of present depositors. It is their business to take deposits when offered. It was not proper for these trustees — or at least the jury may have found that it was not — to take the money then on deposit and invest it in a banking-house, merely for the purpose of drawing other deposits. In making this investment, the interests of the depositors, whose money was taken, can scarcely be said to have been consulted.

It matters not that the trustees purchased this lot for no more than a fair value, and that the loss was occasioned by the subsequent general decline in the value of real estate. They had no right to expose their bank to the hazard of such a decline. If the purchase was an improper one when made, it matters not that the loss came from the unavoidable fall in the value of the real estate purchased. The jury may have found that it was grossly careless for the trustees to lock up the funds in their charge in such an investment, where they could not be reached in any emergency which was likely to arise in the affairs of the crippled bank.

We conclude, therefore, that the evidence justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires.

[Omitting remainder of opinion.]

*Judgment [on verdict for plaintiff] affirmed.*

5 May 27 Mahan & Dalley Esq. remarked, a d. f. He was simply a director & as such attended some meetings. & board & so he was a director must we attribute to him for keeping charging him w. of a knowl. all affairs. & Co. If law requires this then & position a director in any large corp like a railroad bank or any corp is one constant peril. The affairs of such a Co are of necessity entrusted generally to man ag. officers. The directors generally cannot know & have not ability or knowledge requests to learn by their own efforts & have cond. & affairs & Co.



## SWENTZEL v. PENN BANK.

1892. 147 Pa. State, 140.<sup>1</sup>

BILL in Equity, praying that directors of the Penn Bank be decreed to pay all moneys lost by their carelessness, negligence and fraudulent management. Facts found by a master, who recommended that the bill be dismissed as to most of the defendants. The assignee of the Bank filed exceptions to the report, and alleged error in various rulings and decrees made in the court below.

*H. A. Miller, D. F. Patterson, and A. M. Brown*, for the assignee.

*S. Schoyer, Jr., D. T. Watson*, and others, for various defendants.

PAXSON, J. . . Briefly stated, the bill was filed for the purpose of holding the officers and directors of the bank responsible for the losses resulting from its failure. It is claimed that the officers and directors were negligent in their management of the bank's affairs, and that by reason of such negligence the losses occurred.

It is conceded on all sides that the losses and the disastrous failure of the bank were directly traceable to Mr. Riddle, its late president, now deceased. He practically emptied the vaults of the bank in carrying on a gigantic speculation in oil. This was done with the knowledge of the cashier, and the coöperation of one or more clerks or subordinates. It would have been extremely difficult, if not practically impossible, for any person to have committed such a swindle without the coöperation of some one inside. The question is whether the directors ought to have known of these transactions, and whether their failure to know what the real plunderer was doing, was such negligence on their part as to render them liable to the creditors of the bank.

The Penn Bank closed its doors in May, 1884. It is not too much to say that its failure was a great shock to the business interests of Pittsburgh. It was the cause of much excitement; led to a large amount of litigation, much of it directed against the board of directors. As usual, in such cases, the current of public opinion was turned against them, and up to the present time they have been defending themselves against hostile litigation. The time has now arrived when the rights of the parties can be considered calmly, and disposed of in disregard of prejudice or popular clamor.

The first question that naturally suggests itself for our consideration is, the extent of the duty which the directors of a bank owe to the stockholders, whom they represent directly, and the creditors, whom they represent indirectly.

Upon this point there is a general misapprehension in the popular mind. This finds expression, after bank failures, in severe condemnation of directors, and a general assertion of the doctrine that their

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

duty requires them to be familiar with all the details of the management. In the popular mind they are held to the rule that they ought to take the same care of the affairs of the bank that they do of their own private business. Even the learned judge below evidently adopted this view, when he said in his opinion: "If we were to decide this case on first impressions, as to the conclusions of fact to be drawn, and under the decisions cited and rules laid down in the minority opinion in *Briggs v. Spalding*, we would say there was gross negligence, or want of the ordinary care that a man of fair intelligence would take of his own affairs."

It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatory. His principal business at the bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods — generally once or twice a week — for an hour or two. The condition of the bank is then laid before him, in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank, in which he participates. The cash on hand is counted, the bills receivable and sureties examined, to see whether they correspond with the statement as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials who are paid for such services, and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business, is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank, doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs.

A vast amount of authority has been cited upon this question, which we do not think it necessary to review. It is sufficient to refer to a few cases only. In *Spering's Ap.*, 71 Pa. 11, the subject is very fully discussed by the late Justice SHARSWOOD, and the rule of ordinary care is laid down. Not, however, the ordinary care which a man takes of his own business, but the ordinary care of a bank director in the business of a bank. Negligence is the want of care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs means one thing; the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give in a short space of time to the business of other persons, from whom he receives no compensation.

Rule

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The same learned judge, in *Maisch v. Saving Fund*, 5 Phila. 30, laid down the rule as follows: "As to the directors, however, receiving no benefit or advantage, they can be considered only as gratuitous mandatories, liable only for fraud or such gross negligence as amounts to fraud." Again, in *Spering's Ap.*, *supra*, he said: "Indeed, as the directors are themselves stockholders, interested, as well as all others, that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill."

We may also refer to *Briggs, Receiver, v. Spaulding* 141 U. S. 132, which goes even further than our own cases upon this point. It does not relieve a director from the consequence of gross negligence in the performance of his duty, but it holds that he is not responsible where he has used the ordinary care which bank directors usually exercise. It is true this was the case of a national bank, but we apprehend that what is negligence on the part of a director of a national bank, would, as a general rule, be negligence by a director of a state bank, and subject to the same liability.

In regard to what is ordinary care, regard must be had to the usages of the particular business. Thus, if the director of a bank performed his duties, as such, in the same manner as they were performed by all other directors of all other banks in the same city, it could not fairly be said that he was guilty of gross negligence. And care must be taken that we do not hold mere gratuitous mandatories to such a severe rule as to drive all honest men out of such positions. This thought is so well expressed by Sir George Jessel, M. R., in his opinion in *In re Penn Coal Mining Co.*, 10 Ch. Div. 450, that I give his remarks in full: "One must be very careful in administering the law of joint-stock companies, not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and, perhaps, all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Willful default no doubt includes the case of a neglecting to sue, though he might, by suing earlier, have recovered a trust fund; in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle."

Holding, then, the rule to be that directors, who are gratuitous mandatories, are only liable for fraud, or for such gross negligence as amounts to fraud, it remains but to apply this principle to the facts of this case.

It is not alleged — it has never been alleged — that the hands of these directors are stained by fraud. The bank was wrecked by its

president, with the cashier and some of the clerks aiding and abetting. It was adroitly done, so far as the means were concerned, and it was concealed wholly from the directors. False entries were made in the books, and false accounts, or accounts with fictitious persons, were opened so as to hide the theft. The reports of the bank's condition, made by the president to the directors, from time to time, showed it to be in good condition, while in point of fact it was honeycombed with fraud, and its assets squandered in wild speculations. It may be asked, why did not the directors discover this by an examination of the books? The answer is, that, if they had examined every book in the bank, with a single exception, they would not have found the fraud. That exception is the individual ledger. All the frauds were dumped into this book, and appeared nowhere else. The individual ledger contains the accounts of the individual depositors, and this book, by the rules of a large majority of the Pittsburgh banks, the directors are not allowed to see. This is a rule of policy on the part of most city banks, and the reason for it is, at least, plausible. A director, largely engaged in business, may have a number of rivals in the same business who are depositors in the bank. If he is permitted to examine their accounts it gives him an advantage and an insight into a rival's affairs that few business men would tolerate. Hence, it is a question with many banks whether to adopt this rule or lose valuable customers, and they generally prefer the former. We are not speaking of the wisdom of the rule, only of its existence, as bearing upon the question of the directors' negligence. Are they to be held to be guilty of gross negligence in not examining a book, which, by the rules of their own bank, and of four fifths of the other banks in Pittsburgh, the directors were not permitted to see?

Nor do we think the directors were bound to regard the statements submitted to them as false, and the president, cashier and clerks as thieves. They had nothing to arouse suspicion. All of these gentlemen stood high; they were the trusted agents of the corporation; paid for their services, and regarded in the community in which they lived as honest men.

Aside from this, the directors were among the heaviest stockholders of the bank. They collectively owned a large proportion of it. And so thoroughly were they deceived by the president as to its condition that, when the first stoppage occurred, they not only believed the suspension was temporary, but they showed their faith by their works, and upon their individual credit raised the sum of \$289,000 to enable it to resume. They did not desert the ship like a parcel of drowning rats, but imperiled their private fortunes in an effort to keep it afloat. Under such circumstances it would be an act of gross injustice to hold them liable for the frauds of others, in which they had not participated — of which they had no knowledge — and which have only been brought to light with the aid of experts. We must measure this transaction by the light which these directors had at the time the

transaction occurred. It would be unfair to judge them by the calcium light which has been turned on for six years, and which has enabled us to trace at last the sinuous path of Biddle and his confederates in crime, and the means by which this bank has been robbed and plundered. We are of opinion that the master and the court below were right in their conclusion, and the decree is affirmed upon the appeal of the assignee, and the appeal dismissed at his costs.

[Omitting opinion on other assignments of error.]

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GIBBONS v. ANDERSON.

1897. 80 *Federal Reporter*, 345.

IN U. S. Circuit Court, Western District of Michigan.

SEVERENS, District Judge. The bill in this case was filed by the complainant, as receiver of the City National Bank of Greenville, to establish the liability of the defendants, Foster and Anderson, who were directors of the bank, for negligence in the performance of their duties as such, which it is alleged has resulted in a heavy loss to the bank and its creditors. The bank was organized April 28, 1884, with a capital stock of \$50,000. It suspended on the 22d day of June, 1893. The complainant was appointed receiver thereof by the comptroller of the currency five days later, and on July 1, 1893, entered upon the discharge of his duties. The total liability of the bank to its creditors at the time of its failure was \$237,733. The nominal value of its assets was about \$326,000, but the total net amount which the receiver has been able to realize from the assets is only about \$40,000. This result is certainly a very startling one, and the enormous loss in the liquidation of the bank's assets calls for an inquiry for its causes. And they are not far to seek. The defendants were members of the board of directors from its organization to the date of its suspension. Le Roy Moore was another director, and, either in the capacity of cashier or president, was its managing officer during the whole of the bank's operations. If during part of the time another person was cashier, he was only nominally such. Moore dominated the bank, and exercised the functions of cashier. Upon investigation it turns out that substantially from the beginning Moore employed the bank for the promotion of his own business enterprises, and, to a steadily increasing amount, has in one way and another diverted its funds to his own use, to the extent that at the date of the suspension of the bank he was indebted to the bank upon paper of which he was the maker in the sum of \$36,263.63, and as indorser in his own name in the sum of \$44,819.59. He was also liable as indorser under the name of Le Roy Moore & Co. in the sum of \$17,419.97. No other person than Le Roy Moore was liable for these

indorsements of Le Roy Moore & Co.; the other member having long since been discharged by the renewal of paper and the extension of credit without his knowledge,—that firm having been dissolved in 1887, and the liabilities thereof assumed by Moore. There was also in the bank at the time of its suspension, representing part of its assets, paper upon which the Stanwood Manufacturing Company was maker to the amount of \$8,750, and upon which it was indorser, \$67,748.54, amounting in all to \$76,498.54. This Stanwood Manufacturing Company was a business concern of which Moore was the owner, with a trifling exception. He owned 2,400 of the 2,500 shares of \$10 each, and, so far as appears, only 20 other shares were taken. The books of the company show that \$15,000 only of its capital stock were paid in, and this by Le Roy Moore's individual promissory notes, upon which he never made any payment. The bank had a chattel mortgage on all its property, and the sum of \$3,500 was the sum realized out of the sale of that property under this mortgage. Over \$63,000 of paper held by the bank, upon which the Stanwood Manufacturing Company was indorser, consisted of accommodation notes made by the employes about the factory of the Stanwood Manufacturing Company, and was worthless. This paper was all unloaded upon the bank by Moore in the prosecution of his own enterprises, and operated practically as a credit to himself. For a number of years prior to the suspension of the bank he was a borrower from it, either upon his own name, or under a guise so thin as to be transparent, to an amount grossly in excess of the legal limit. The comptroller in his letter of October 14, 1892, states that at the last examination he was directly indebted to the bank in the sum of \$29,565. In all these ways, direct and indirect, Moore converted the assets of the bank to his own use, and in the end it appears that for all these large sums which Moore had obtained, and which were represented by paper which he had employed for that purpose, amounting to \$172,768.88, only a very little can be realized. Moore made a trust deed of all his property to secure the debts he owed to the bank, out of which not more than \$12,000 to \$15,000 can be realized. This is the result, not of a single fraud, nor of a group of contemporaneous frauds, practiced by Moore, but, as already stated, it is the consequence of malversation of the funds of the bank from about the beginning of its history. It is needless to go into detail. The books of the bank show that he was going deeper and deeper into the funds of the bank, and, under one cover or another, converted of its assets more than three times the amount of its capital stock. The defendants, who were directors all this time, say that they were ignorant of anything wrong in the affairs of the bank until their eyes were opened to the facts by its failure. Greenville is a small place, of only about 3,000 inhabitants, and the defendants resided there. The volume of the business of the bank was comparatively small,—certainly not so large but that the most cursory examination of the general features of its business by

any one having ordinary business intelligence would have disclosed the truth. It is contended by the directors that they did not in fact know how Moore was carrying the substance out of it, and it is the more charitable view to take of their conduct to the extent that supine negligence is more easily excused than active fraud. There is in the record the testimony of witnesses stating that at the time of the failure of the bank these defendants declared that they trusted all to the president, and that they knew but little of the bank's affairs, relying as they did upon their confidence in the management. But what else can be said than that, if they had notice of the facts, they were culpable, or that, if they did not know them, they were grossly negligent and inattentive to their duties? The testimony convinces me that the latter is the fact, and that their negligence and lack of interest was so profound that not even the disclosures and the warning contained in the letter of the comptroller of October 14, 1892, and which, pursuant to his request, was brought to their attention, aroused them from the stupor which beset them; for the situation was in no wise redeemed, and grew steadily worse without the moving of a hand by the directors to save it. From the time of their election the board of directors seems to have slumbered over the affairs of the bank while its managing officer was plundering it of all that it owned, and much that belonged to others. Once in a while there seems to have been some faint consciousness, but nothing which indicates any activity. But they say, and have called witnesses to prove, that acting in accord with the usage and custom of national banks, and having called into the management a person in whom they had entire confidence, which was justified by his reputation, and committed the affairs of the bank to him, they were not bound to have doubt and distrust of his correct dealing until something occurred which should arouse suspicion. And this is their defense. The learned counsel for the defendants puts the question thus:

"Whether a director in a national bank is individually liable for loss to the bank accruing through another director, viz. its president, when such mismanagement was not known to or participated in by the directors sought to be charged."

Or, in another form:

"Whether an individual director in a national bank is liable in his individual capacity for all losses occasioned by the mismanagement of the bank's affairs by a trusted officer through the neglect of the board of directors to meet and examine into the affairs of the bank."

These questions present in the most favorable light for the defendants what is undoubtedly the substance of the inquiry upon the facts which existed in this case, and which is, in short, this: Whether the duty of the board of directors is discharged by the selection of officers of good reputation for ability and integrity, and then leaving the affairs of the bank without any other supervision or examination than mere inquiry of the officer, and relying upon his statements until some

cause for suspicion attracts their attention. Section 9 of the national banking act, being section 5147 of the Revised Statutes, provides that:

"Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association."

And by section 5145 it is declared that the affairs of such association shall be managed by not less than five directors. The oath which the director is required to take, that he will diligently and honestly administer the affairs of such association, indicates the scope of his obligation. The management of the bank is cast upon the board of directors. The duty of managing and administering the affairs of the bank by the board of directors has been differently construed in decisions bearing upon this subject, but it is not necessary for me to analyze the cases, or to reconcile their apparent differences. Some of them have gone to a length which in my opinion is extremely dangerous to the public safety, and, if generally applied, would make these banking associations, which were designed to supply the people of the country with financial institutions hedged about with security on which their confidence might securely rest, the objects of doubt and distrust. The rule of decision by which my judgment in the present case must be guided is laid down in the case of *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924. Much of the discussion in that case was devoted to the consideration of the special circumstances upon which rested the charges made against the several directors. Those circumstances have little or no resemblance to those of the present case, and not much aid is afforded by that part of the discussion; for, as the court in that case observed, each case must stand upon its own facts. The directors in that case were held to be excusable. One very important and noticeable difference between that case and this is in the fact that the question there was narrowed down to one of fact, as to whether the defendants were fairly liable for not preventing loss by putting the bank into liquidation within 90 days after they became directors, the previous condition of the bank being admitted to have been good, whereas in the present case the defendants' neglect runs through quite a number of years. But the court laid down certain general rules by which the obligation of directors of national banks is to be tested; that is to say, they declare what is the minimum of that obligation. Chief Justice Fuller, delivering the opinion of the court, said:—

"We hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled, under the law, to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision; nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention."



In my opinion, it does not meet the requirements of this statement of the law that directors may confide the management of the operations of the bank to a trusted officer, and then repose upon their confidence in his right conduct, without making examinations themselves, or relying upon his answers to general questions put to him with regard to the status of the affairs of the bank. To begin with, it is to be assumed in every case that the directors have not selected any other than a man of good reputation for capacity and integrity. Any other idea assumes that they have been guilty at the outset of a glaring fault. Further, it is a well-known fact that a large proportion of the disasters which befall banking institutions come from the malfeasance of just such men, and it would be manifest to everybody that only a satisfactory and quieting reply would be made by the official who has any reason for concealment. Again, what are the duties of management that are committed to the cashier, or the officer standing in his place? They are those which relate to the details of the business, to the conduct of particular transactions. Even in respect of those, his duties are conjoint with those of the board of directors. In large affairs it is his duty to confer with the board. In questions of doubt and difficulty, and where there is time for consultation, it is his duty to seek their advice and direction. It is his duty to look after the details of the office business, and generally to conduct its ordinary operations. It is the right and duty of the board to maintain a supervision of the affairs of the bank; to have a general knowledge of the manner in which its business is conducted, and of the character of that business; and to have at least such a degree of intimacy with its affairs as to know to whom, and upon what security, its large lines of credit are given; and generally to know of, and give direction with regard to, the important and general affairs of the bank, of which the cashier executes the details. They are not expected to watch the routine of every day's business, or observe the particular state of the accounts, unless there is special reason; nor are they to be held responsible for any sudden and unforeseen dereliction of executive officers, or other accidents which there was no reason to apprehend. The duties of the board and of the cashier are correlative. One side are those of an executive nature, which relate mainly to the details. On the other are those of an administrative character, which relate to direction and supervision; and supervision is as necessarily incumbent upon the board as direction, unless the affairs of banks are to be left entirely to the trustworthiness of cashiers. Doubtless there are many matters which stand on middle ground, and where it may be difficult to fix the responsibility, but I think there is no such difficulty here. The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused,

which generally does not happen until the mischief is done, cannot be accepted as sound. It is sometimes suggested, in effect, that, if larger responsibilities are devolved upon directors, few men would be willing to risk their character and means by taking such an office; but congress had some substantial purpose when, in addition to the provision for executive officers, it further provided for a board of directors to manage the bank and administer its affairs. The stockholders might elect a cashier, and a president as well. The banks themselves are prone to state, and hold out to the public, who compose their boards of directors. The idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as makeweights in its solicitations for business, would only select a cashier, and surrender the management to him? It is safe to say such an institution would be shunned and could not endure. It is inconsistent with the purpose and policy of the banking act that its vital interests should be committed to one man, without oversight and control.

Recurring to the present case, it is clear that unless the board of directors is to be absolved upon the theory that they were justified in committing the affairs of the bank to Moore, and relying upon his good conduct, and his answers to the perfunctory questions which were occasionally put to him, until they were brought to the facts by the collapse of the bank upon the first prick of a financial stringency such as came upon the country in the summer of 1893, they must be held liable. It is with sincere commiseration and regret that the court feels compelled to reach this conclusion, in view of the consequence which must follow to these directors. But there is another side to this matter. The court cannot ignore the rights and interests of the depositors and others who have trustfully confided their money to the bank, and who now find that it was run through a shell into the hands of Moore, while the defendants turned their heads away, and failed to give them the protection which a proper discharge of their duties would have afforded. The records of the board of directors make a sorry showing, when put in contrast with the financial history of the bank. The entries are few, at long intervals, and are almost wholly limited to the election of directors and the declaration of dividends. They are feebly supplemented by the oral testimony of the

defendants, which tends only to show that individual inquiries were occasionally made by them, of a comparatively superficial character. There was no examination of the books; at least, none of any value. If there had been such examination by a fairly intelligent man, such as a director promises he is, the condition of things would have been seen. It is not irreconcilable with what they declared, when the bank failed, with respect to their knowledge of its affairs, and with what I must believe was substantially the truth of the matter. It may be conceded that the members of the board were not responsible for the malfeasance or nonfeasance of their associates, where the fault of the others was not known to them, and they were helpless to prevent the consequences; but in the present case the charge of negligence rests upon the whole board, and there is nothing to show that the defendants took any steps to retrieve the consequences of the joint negligence. If the defendants had been able to show that they themselves had done what they could to induce the board to attend to its duty, a different case would be presented. I do not understand why the comptroller did not more energetically interfere, but I have no duty to criticise his action.

[The learned Judge then *held*, that the date from which the directors should be charged with losses was July 1, 1892; when the fact that a year had elapsed without the declaration of a dividend should have induced the directors to institute an examination.]

*Decree to be entered in conformity with the above opinion.*

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### DOVEY v. CORY.

L. R. [1901] A. C. 477.

THIS was an appeal from the decision of the Court of Appeal (the Master of the Rolls, now Lord LINDLEY, Sir F. H. JEUNE, and Lord Justice ROMER), which reversed a judgment of Mr. Justice WRIGHT. The hearing before the Court of Appeal (*sub nomine* "*In re National Bank of Wales*") is reported in 15 *The Times* L. R. 517; L. R. (1899) 2 Chan. 629; and 68 *L. J. Chan.* 634.

The appellant is the liquidator of the National Bank of Wales, and the Metropolitan Bank (of England and Wales) have purchased and taken over its assets and liabilities. The respondent, John Cory, was for some years a director of the National Bank. In the liquidation of the latter a summons was taken out to render the respondent liable — not to creditors, all of whose claims had been satisfied — but to the contributories, in respect to alleged misfeasance (1) in paying dividends out of capital; (2) in making improper advances to directors;

*Suit by John  
(then liquidator)  
vs a director*

*charges*

and (3) in making improper advances to customers who were, or were reputed to be, insolvent, and the summons asked that the respondent should be ordered to repay the full amount of all losses caused by such acts of alleged misfeasance with interest and costs. Mr. Cory became a director on November 23, 1883, and resigned on December 18, 1890. The summons asked that the respondent should be deprived of the benefit of the Trustee Act, 1888, and of the Statutes of Limitation, on the ground that the losses arose from the respondent's wrongful acts and fraudulent concealment of the true state of affairs. The appellant's counsel, however, disclaimed the imputation of any moral obliquity on the part of the respondent, but argued the question on the basis of negligence and failure to discharge the duties of a fiduciary position. The transactions complained of were voluminous and ranged over a series of years and related to the affairs not only of the head office, but of the branches, which in 1890 were 33. It was, however, found possible by the parties to condense the story within the limits of four volumes and about 1500 pages. In February, 1893, an agreement was entered into between the National Bank of Wales and the Metropolitan, Birmingham, and South Wales Bank, now the Metropolitan Bank (of England and Wales) (Limited) whereby the latter bought the assets and goodwill and undertook the liabilities and contracts of the former, the value of the assets and goodwill being taken at not less than £110,000. Voluntary resolutions were passed for winding up the National Bank, and Thomas Cory, its former chairman, and the appellant were appointed liquidators. Mr. Thomas Cory subsequently resigned and the appellant became sole liquidator. The alleged amount of improper payments of dividends was £52,986; of loss on advances and credits to directors to December 31, 1890, £37,731, and of loss on improper advances to customers, £43,087. The whole of the assets were realized or valued, and the appellant Dovey alleged that after discharging the liabilities of the National Bank and crediting it with the value of its assets and £110,000 as its goodwill, there remained a deficiency of assets amounting to £84,392. Calls were made of £2 10s. per share each in July, 1896, and September, 1899. Mr. Justice Wright ordered the respondent to pay £54,787, being £37,000, the aggregate amount of dividends paid to the shareholders in 1887, 1888, 1889, and 1890 (except a part of the last dividend), and as to the balance, interest at 5 per cent. on each of the dividends. The learned Judge held that all these dividends were in fact paid out of capital; but he declined to make the respondent liable for improper advances to directors or customers. The Court of Appeal, in an elaborate judgment delivered by the Master of the Rolls, exonerated the respondent from liability. This decision was affirmed by the noble and learned Lords.

Sir R. T. Reid, K. C., Inghen, K. C., and S. T. Evans, for appellant.  
 Swinfen Eady, K. C., Rufus Isaacs, K. C., G. F. Hart and E. A. Nepean, for respondent.

*No moral obliquity  
 but neglect*

*Sheldon*, for Metropolitan Bank of England and Wales, which was originally a respondent, but subsequently made an appellant.

The LORD CHANCELLOR, [LORD HALSBURY].—In this case the liquidator of the National Bank of Wales (Limited) appeals against a judgment of the Court of Appeal, whereby Mr. John Cory, the respondent, was discharged from the liability which Mr. Justice Wright's judgment had imposed upon him to pay £37,000 for the benefit of the shareholders of the company, in respect of dividends already distributed, and a further sum for interest. Mr. John Cory was a director of the company, and it is for his supposed misconduct in the management of the affairs of the company that this liability was imposed upon him. It is alleged and proved that certain losses have been sustained by the company, and the ground upon which Mr. John Cory is sought to be made liable is the very short and intelligible ground that he was a party to false and fraudulent statements as to the position of the company and had had a share in causing these losses. The Court of Appeal have acquitted him of any knowledge of what was falsely stated, and Sir Robert Reid, in opening this appeal, stated to your Lordships that he did not intend, in arguing for Mr. John Cory's liability, to impute to him any moral obliquity. Now there is no doubt that there were balance-sheets laid before meetings of the shareholders which, to use the language of the articles of the association, were not proper and which did not truly report as to the state and condition of the company, and did not comply with the requirements of the articles in question in respect of the particular sum which the directors recommended as dividend, that it should be paid out of the profits, but a greater sum was paid out as dividend than would have been paid if certain things had been taken into consideration, and therefore larger than should have been paid. A great part of the judgment, both of Mr. Justice Wright and of the Court of Appeal, is occupied by discussing matters which are not now before your Lordships as matters in debate. It is now admitted that Mr. John Cory ceased to be a director in December, 1890. My Lords, I am clearly of the opinion that the judgment of the Court of Appeal is right and ought to be affirmed; but my opinion is entirely based upon the question of fact that he was guilty of no breach of duty whatever, and for reasons which I will refer to hereafter I am very anxious not to deal with some reasons given for their judgment by the Court of Appeal, which, in view of the facts that I take, do not arise here; and in what I say I desire to be understood as only dealing with the facts of this particular case. Now, in the first instance, I will assume that the company has sustained loss by the issue of fraudulent balance-sheets, by the improper advance of money to the customers of the bank, and that it has also sustained loss by the lending of money to directors without security. With respect to the default involving liability, if Mr. John Cory was conscious of the falsehood it is not necessary to go any further. Like

No knowledge charged

any one else who is a party to a false statement acted upon to the prejudice of the person to whom it is made, he would be liable to the extent to which his falsehood has inflicted loss on his victims, but after the admission that has been made it is unnecessary to pursue this head of inquiry; he certainly could not be acquitted of moral obliquity if party to a fraudulent statement; but it is said he has so grossly neglected his duty as a director that, though he may not have known the true state of the facts, he ought to have known them, and his breach of duty in that respect renders him liable. In order to see how far this obligation is made out it is necessary to consider what the business of the company was, and what was the position of Mr. John Cory in relation to it. My Lords, I think it is idle to talk in general terms of the duty of a director to look after the concerns of the company of which he is one of the managers without seeing what in the ordinary course of business he ought to do or to have done. Now there are some things which, of course, must be, or at all events ought to be, apparent to any one responsible for the conduct of a commercial business, and we must apply that observation to the business of which we are speaking—namely, a banking business; but I do not understand that any one has suggested that there was neglect or default by reason of the absence of some system under which, if honestly carried out, the interests of the bank would have been in that respect secured. It is admitted that (extract from judgment of the Court of Appeal) the company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks each with its own manager. The course of business was this. Each branch manager sent weekly to the head office what is called a weekly state—i. e., an account showing how the assets and liabilities of the branch stood, what advances or overdrafts had been made or allowed and to whom, what securities the bank held, and other matters. Every quarter each branch manager made a more formal return to the head office showing the position of the branch and the business done during the past quarter. It was the duty of the general manager to examine these documents and to report to the board anything disclosed by them which required their attention. The weekly states or quarterly returns were in the board rooms for reference in case of need, but unless attention was called to them the directors did not think it necessary to examine them. The chairman of the directors was Mr. Thomas Cory, a brother of Mr. John Cory. The chairman and general manager (Mr. Collins) visited each branch bank every year; and, in addition, two skilled inspectors frequently went round and inspected the accounts and reported to the general manager. The accounts of the branch bank, appear, however, not to have been separately audited by professional accountants. The auditors employed to examine the company's accounts and to certify the annual balance-sheets and accounts laid before the shareholders only

Charge

Some duties  
positive on the

Proper system

Where it is

Weekly reports  
to head manager

Also quarterly

General manager  
examined theseInspected by  
main general manager  
also by two inspectorsGeneral audit of  
the head office  
accounts(but not separate  
branch officers)

saw the head office books and the returns from the branch offices certified by their respective managers to the head office. These certified returns formed part of the weekly states, but omitted much that they contained. The minutes of the directors' meetings show that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board either by the chairman or by the general manager. Mr. John Cory stated in his affidavit the general course of business at board meetings, and his cross-examination does not substantially differ from the account he there gives. But it is suggested that Mr. Cory is responsible because this and other portions of the system were not faithfully adhered to. And, indeed, what is really made the test of his responsibility is that he did not find out what was fraudulently withheld from his knowledge. So the warning letters of the auditor, which were never suffered to reach him, are suggested as warnings to him which he ought not to have neglected. Again, there was the insufficient striking out of bad and doubtful debts, by which it is alleged that the amounts paid in dividends to himself and other directors, as well as shareholders, are by a process of reasoning and calculation assumed to be payments out of capital. These things are all assumed to have been done as though done with knowledge and intention, while at the same time the admission is made that there was no evil mind or conscious fraud. Now I think such things, if done with evil mind and intention, would be fraud, and it comes back again to the proposition that the responsibility must be based upon the assumption that Mr. Cory is responsible because he did not find out the fraudulent knaves by whom he was surrounded. One was his own brother, another was the general manager, and, once I arrive at the conclusion that there were those about him whose interest and object it was to deceive him, I certainly do not think that the things which were designedly concealed from him are things which ought to be relied upon as matters for which he was responsible. In the view I take the whole of the evidence — which is relevant and important to the question, did Mr. Cory knowingly permit the things to be done which were done — becomes to my mind entirely immaterial if one is to start with the assumption that he knew nothing about them. Dealing with the several heads of charge as they have been formulated in the judgment of Mr. Justice Wright — viz., negligence, breaches of trust in respect of advances made contrary to said articles of association, and payment of dividends out of capital. I think each and all of them may be disposed of by the proposition that Mr. Cory was not himself conscious of any one of these things being done, and that unless he can be made responsible for not knowing these things, as Mr. Justice Wright put it, unless he is shown to have exhibited a complete neglect of the duties he had undertaken, the charges are not made out. The charge of neglect appears to rest on the assertion that Mr. Cory, like the other

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It is necessary  
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directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors — how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious that if there is such a duty it must render anything like an intelligent devolution of labor impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairman were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for debts and that he believed such assurances is involved in the admission that he was guilty of no moral fraud; so that it comes to this — that he ought to have discovered a network of conspiracy and fraud by which he was surrounded and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors themselves. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers — and the theory of his being free from all fraud assumes under the circumstances that he was — there appears to me to be no case against him at all. The provisions made for bad debts, it is well said, was inadequate, but those who assured him that it was adequate were the very persons who were to attend to that part of the business — and so of the rest. If the state and condition of the bank were what were represented, then no one will say that the sum paid in dividends was excessive. If I assume, as I do, that Mr. Cory acted upon representations made to him which he believed and which came from the officers of the bank to whom he was, in my judgment, justified in giving credit, the discussion of whether the dividends actually paid were or were not properly divisible, has no bearing on Mr. Cory's liability, and I am very reluctant to give any opinion upon it, inasmuch as the question may arise when it may be necessary to decide it. I deprecate my premature judgment. My Lords, I am, as I have said, very reluctant to enter into a question which for the reasons I have given does not arise here, and into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should be supposed to adopt a course of reasoning as to which I am not satisfied that it is correct. I doubt very much whether such questions can ever be treated in the abstract at all.



The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question what may be treated as profits and what as capital. Even the distinction between fixed and floating capital which in an abstract treatise like Adam Smith's "Wealth of Nations" is appropriate enough, may with reference to a concrete case be quite inappropriate. It is easy to lay down as an abstract proposition that you must not pay dividends out of capital, but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire, as I have said, not to express any opinion, but as an illustration of what difficulties may arise the example given by the learned counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnerships, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin. On the other hand, companies cannot at their will and without the precaution enforced by the statute reduce their capital; but what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete case we must deal with them, but until they do I, for one, decline to express any opinion not called for by the particular facts before us, and I am the more adverse to doing so because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a Court of law. I move that this judgment be affirmed and this appeal dismissed with costs.

[LORD MACNAGHTEN delivered a short concurring opinion.]

LORD DAVEY. . . . The respondent, in his affidavit, states generally that he was from first to last under the honest and genuine belief that the affairs of the company were in a sound and solvent condition, and that its business was being carried on at a profit, and that its net profits for the time being were amply sufficient to justify the dividends which were from time to time during his directorship paid to the shareholders. And he adds that the general manager and branch managers were, so far as he knew, men of unquestioned confidence and integrity; and that he and his co-directors were compelled by the magnitude of the business and the exigencies of the case generally to rely upon (and he did rely upon) these officials in all ordinary matters relating to the accounts of customers and other questions of detail. And he deals specifically with the various matters alleged in the liquidator's evidence on the same lines. The respondent was cross-examined on his affidavit at great, but not unnecessary, length. I am not, I think, doing injustice to the appellant's case when I say that reliance was chiefly placed on the "weekly states" and "quarterly returns" made

by the branch managers, or that, if he cannot succeed in fixing the respondent with liability on these documents, his case fails. These returns were laid on the table in the board room at each meeting of the directors. A comparative analysis of them, made by the skilled accountant who advises the appellant, does, I think, show that certain accounts which were treated as good by the general manager in the preparation of the balance-sheets submitted by him to the directors were, in fact, irretrievably bad, and it is difficult to acquit the general manager of improper conduct in including them as assets. The respondent says in his affidavit that the "weekly states" consisted each week of a very large and voluminous pile of sheets, which it would have taken the directors a couple of days to go through, and that it was the duty of the general manager to go through the weekly states, with the letters of the branch managers accompanying them, and to place upon the agenda any points arising upon them which he considered ought to be brought to the attention of the directors; and upon the discussion of such points the documents were, when necessary, referred to; but, except in such cases, the weekly states were not consulted by the directors, but they relied on the general manager going carefully through them and drawing their attention to any matter requiring their consideration. On cross-examination he adhered to this statement. He added that the chairman also went through them often individually, and he did so for the board. He admitted that before recommending a dividend he did not look at all the accounts or look at the books themselves, but he said that the directors looked at the documents which were put before them by the manager — the amount which he considered was doubtful and bad — and they made a reserve for it. He also said that it was never brought before him that amounts due from bankrupt debtors were included in the balance-sheets of each year, and he never heard of any single case of that kind. It further appeared from the evidence of other witnesses that the branches of the bank were regularly visited and their books examined by the chairman and two inspectors. In this state of the evidence, I ask whether the course of business at the board meetings as described by the respondent was a reasonable course to be pursued by the respondent and other directors, or whether the knowledge that might have been derived from a careful and comparative examination of the weekly states and quarterly returns from the different branches of the bank ought to be imputed to the respondent, or alternatively, whether he was guilty of such neglect of his duty as a director as would render him liable to damages? I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and gen-

Rule

eral manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in "*Hallmark's Case*" (9 Ch. D., 329), and by Mr. Justice Chitty in "*In re Denham & Co.*" (25 Ch. D., 752), that directors are not bound to examine entries in the company's book. It was the duty of the general manager and, possibly, the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration, but the respondent was not, in my opinion, guilty in negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the appellant has not made out to my satisfaction that the respondent wilfully (as that term is explained in the cases I have referred to) misappropriated the company's funds in payment of dividends.

[LORD BRAMPTON concurred.]

Judgment affirmed. Appeal dismissed.

7:24 750.4  
 If no improper act - Dir & no gross neglig<sup>c</sup>. For that at least may a director permit affairs of corp to be managed by his fellow directors & become in some degree liable thru his inaction for any & result of their improper act. Sec. 8 Cal C R 18.

He is responsible for particip<sup>n</sup> in their wrong doing & for knowledge of it but if he is ignorant of it - Has he a duty to keep se informed of corp affairs

Cal Const XVI 3(b) The directors, corp<sup>s</sup> & stock ass<sup>n</sup> shall be jointly & severally liable to creditors for all moneys embezzled or misapplied by officers of such corp or stock ass<sup>n</sup> during term of office, such director or trustee

Penal Code. 560, 563, 4, 569, 570 Civil Code 2238 cf 136/432-5

Cases 108/369, 426. 136/432. 132 P 50 9 C App 504  
 12456- 17661 sec app 705 132 P 50 9 C App 504  
 136/432. 132 P 50 9 C App 504  
 liable for & misapprop<sup>n</sup>. - surety may stand on letter of his bond 444

"No one contends that the suretyship extends to a resulting & mere negligent result in some misapprop<sup>n</sup>, nor to loss thru bad management or incompetency or mistake

(If an officer of a corp knowingly appropriates funds entrusted to him for unlawful & unauthorized purposes & loss accrues, corp's depositors are liable - dict of 449. 454

132 P 80 - act & kn. imputed to one & facts, other held on p 81, 82, 83

"On a bus. receiving deposits a corp is as good as a bank & it must be presumed that it has full kn. & manner in which such funds were deposited & unless a strong excuse is made of some excuse such as a protest offered & not correct, to the misapprop<sup>n</sup> of funds taken by such Dir to prevent loss & accrue to deposit such Dir becomes personally liable to persons &

Indulging Principles: (1) Transo: 2 a trustee as such and himself on other side as private party are void at option. cestui we regard to fairness or benefit. 28 A & E 1016 39; Lewin Trusts 562, 563 CCC 2230-35  
2 Transactions 2 a trustee & cestui as trustee as private person are p. void but if trustee shows by a full disclosure OK. 28 A 88, 102, Lewin 565-6  
MOBILE IMPROVEMENT CO. v. GASS. CCC 2230-35

cf 82 Cal 867 sep 37 2 429

(D) Contracts between a Director and the Corporation.

MOBILE IMPROVEMENT CO. v. GASS. - auth<sup>g</sup> of and dir<sup>g</sup>

1904. 142 Alabama, 590. 39 S. .

vote - abs necessary to auth<sup>g</sup>

Gass and three other directors voted to convey certain land belonging to the corporation to Gass, on the performance of certain acts by Gass. The three other directors were less than a quorum. The conveyances were thereafter made, and the corporation sought the cancellation of the deeds. The court granted relief against Gass. 28 A 88, 102, Lewin 565-6

ANDERSON, J. While the deeds sought to be cancelled purport to have been authorized by a resolution passed at a meeting in Mobile in the year 1891, it is an undisputed fact that they were made under and pursuant to a resolution of a bare quorum of directors, at a meeting held at Flint, Michigan, in the year 1896. The evidence also discloses the fact that, at said meeting, the presence of and the participation therein by the respondent, Gass, was necessary to constitute a quorum and to give it legal vitality, and that the vote of Gass secured the passage of the resolution.

The directors of a corporation are the trustees and managing partners, and the stockholders are the *cestui que trust*, and have a joint interest in all of the property and effects of the corporation. *Robinson v. Smith*, 3 Paige, 222, 232; *Cunningham v. Pell*, 5 Ib. 607; *Slee v. Bloom*, 19 Johns. 479.

"If this is the relation, then the rules of law applicable to purchasers by agents and trustees apply to the purchase in question. There is a manifest impropriety in allowing the same person to act as the agent of the seller and to become himself the buyer. There may be, in all such cases, a conflict between the duty and interest. Acting for the best interests of the corporation, his disinterested and unbiassed convictions of duty might be to advise against a sale of the entire property to one creditor, or against any sale at all. It is in view of these considerations that 'the wise policy of the law hath put the sting of a disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation.' Even these principles would not, in my judgment, apply in the case, if there had been a quorum without Buell.

"Now the purchase of property by an agent or trustee, or by any person acting in a fiduciary capacity, is not void *ab origine* and absolutely. It is voidable only. It is made subject to the right of the principal or beneficiary, in a reasonable time, to say that he is not satisfied with it. It is valid in equity as well as law, unless the parties interested repudiate it, or complain of it; and these may set it aside without showing either fraud or injury. *Bank of Old Dominion v. Dubuque Railroad Co.*, 8 Iowa, 227; *Davoue v. Fanning*, 2 Johns, Ch. 252; *Bostwick v. Atkins*, 3 Comst. 53, 60; 1 Parsons Cont. 75, 76 and

for what is necessary to show by on part. Sir. He didn't disclose his interest in the case in 144. But 603 my child as upheld.

case in note; 1 Lead. Cases in Eq. 167; *MacGregor v. Gardner*, 14 Iowa, 326, 335.

"As the principal or parties interested may confirm the sale, a mere stranger cannot make the objection, that the trustee was the purchaser, or that the sale was irregular. The remedy belongs only 'to persons who had an interest in the property before the sale, and no other person can apply to set aside the sale.'" *Corey v. Wadsworth*, 118 Ala. 507, 508; *Hawley v. Cramer*, 4 Cow. 717, 744; *Edmondson v. Welsh*, 27 Ala. 578; *Foster v. Goree*, 5 Id. 428; *Hannah v. Carrington*, 18 Ark. 85; *Herbert v. Henrick*, 16 Ala. 581; *Greenleaf v. Queen*, 1 Pet. 138; 5 Barr. 97; *Wightman v. Doe*, 24 Miss. 675.

The directors of a corporation are its agents. Their position implies that confidence is reposed in them. The duties which a director assumes to the corporation and the stockholders thereof, disqualifies him from binding the corporation in a transaction in which he is already interested. *O'Connor Mining & Mfg. Co. v. Coosa Furnace Co.*, 88 Ala. 630.

10/1/05 acc  
A 3/14, 3/16 3/17

UNITED STATES STEEL CORPORATION v. HODGE.

1902. 64 N. J. Eq. 807.

C 2 Trustee as purp part  
+ trustee & indep t body

THE directors of the United States Steel Corporation voted to retire \$200,000,000, par value, preferred stock, by issuing to the holders in exchange for such stock its bonds or cash raised by a sale of its bonds. J. P. Morgan was a director of the corporation, and a member of the firm of J. P. Morgan & Co. The corporation, acting by its directors, entered into a contract with J. P. Morgan & Co., which provided that the firm was to purchase a certain number of the bonds, and to pay for them in preferred stock or cash, in consideration of certain commissions. This contract was expressly made subject to the approval of the stockholders. J. P. Morgan & Co. formed a syndicate to insure their performance of the contract. A special meeting of the stockholders was called, the notice stating that some directors were interested in the syndicate. The stockholders approved the contract. The court held that under these facts the contract bound the corporation.

VAN SYCKEL, J. The object of the rule is to prevent directors from secretly using their fiduciary position for their own emolument, and not to impair the right of stockholders to enter into any lawful engagement with a full disclosure of the facts.

In *Stewart v. Lehigh Valley Railroad Co.*, *supra*, Mr. Justice Dixon, in delivering the opinion of this court, says: "After an examination of all the cases cited, as also such others as I have found, and a careful consideration of the principle, and the results of regarding and disregarding it, I have come to the conviction that the true legal rule is that such a contract is not void, but voidable, to be avoided at the option

of the *cestui que trust*, exercised within a reasonable time; I can see no further safe modification or relaxation of the principle than this."

It is a settled rule of corporation law that the personal interest of directors renders a transaction voidable at the option of the stockholders, and not void *per se*.

Under the declaration of this court in the case last cited the shareholders may, within a reasonable time after the disclosure to them of the interest of a director, elect to avoid the contract; but if an unreasonable time is allowed to elapse without exercising such option, during which the position of directors become so changed that it would be inequitable to vacate the engagement, equity would refuse to interpose.

*A fortiori*, when the contract is entered into by the stockholders with the directors, or when the stockholders expressly authorize the directors to enter into a contract, when the stockholders have notice of the directors' interest, the agreement will be unassailable in the absence of actual fraud or want of power in the corporation.

In the case *sub judice*, the contract was in effect made between the stockholders themselves and J. P. Morgan & Co., and it cannot be successfully assailed without maintaining that stockholders are without capacity to make a valid contract with the directors of their company.

It would be manifestly contrary to fair dealing and good faith to permit stockholders to invite directors to enter into an engagement, and after the directors had put themselves in a position in which the contract could be enforced against them, to permit the stockholders to deprive them of the benefits of it.

In my investigation no case has been found which will justify such a result. 112/53 acc 820686. 143/352.

62  
F. FORT PAYNE ROLLING MILL v. HILL. C. Wash. trustee didn't vote

1899. 174 Massachusetts, 224.

CONTRACT for money had and received. At the trial in the Superior Court, before Fessenden, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

HOLMES, C. J. This is an action to recover a sum received or retained by the defendant by way of discount upon debts of the plaintiff company which the defendant settled. This discount was or might have been found to have been received by the defendant in pursuance of votes of the directors by which he was employed to settle claims against the plaintiff company, and was to be allowed five per cent. of the face value of bonds used in payment and whatever discount he could get from the claims. He was a director, but took no part in the votes. The main question is, whether after the services have been

rendered a receiver of the company has the right as matter of law to avoid the contract under which they were rendered. The jury have found that all parties acted in good faith and that the contract was not improvident. They may have found more specifically that the defendant advanced his own money to settle the claims, that the claims were secured by liens and were being pressed, and that the company had no other way of raising money. We are not prepared to say that the receiver may avoid the contract now. If made with any one else, it would have been binding. It was not illegal or void because made with a director, the only person likely to be willing to make it. In this country it very generally has been deemed impracticable to adopt a rule which absolutely prohibits such contracts. *Nye v. Storer*, 168 Mass. 53, 55. Whatever small conflict of interest between himself and the company there may have been, was no greater or other than that between a broker paid by a percentage and his principal. It was manifest and must have been understood. The contract called for action outside the defendant's duty as director, or at least, on the defendant's evidence, needed such action before it could have any effect, for it was no part of the defendant's duty as director to advance his own money. Assuming the contract to have been a provident one, as it well may have been, and as the jury have found that it was, it seems to us not much more open to objection than a contract with a managing director to pay him a salary.

It is argued that the defendant did not pursue the votes because he bought up the claims and held them as security for the sums advanced by him. But under the terms of the arrangement with the defendant, the course adopted did not in any way tend to the disadvantage of the company, and we must take it that the jury have found, as they had a right to find, that the purchase was merely a step in a transaction which ended, and from the beginning was intended to end, in the payment of the claims. It does not seem to us that a more definite discussion of the rulings asked and given is necessary.

*Exceptions overruled.*

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STEWART v. LEHIGH VALLEY R. CO.

1875. 38 *New Jersey Law*, 505.<sup>1</sup>

In the Court of Errors and Appeals, upon error to the Supreme Court.

*Ry Co sued Stewart*  
*for tolls. Shad*  
*a C. & B. Co.*  
*former owner of Canal*  
The Lehigh Valley Railroad Company sued Cornelius Stewart and Joseph C. Stewart, in *assumpsit*, for tolls upon the passage of boats with merchandise over the Morris Canal. The defendants, in 1868, made a contract under seal with the Morris Canal and Banking Company,

<sup>1</sup> Only so much of the report is given as relates to a single question. - Ed.

*See note at 91 All 598. 1918.*

whereby it was stipulated (*inter alia*) that, for a term of five years, the defendants should be allowed a drawback of one half the tolls payable according to the printed rates for certain classes of freight. At the date of this contract one of the defendants was a director of the Morris Canal and Banking Company. In 1871 the Morris Canal and Banking Company leased its canal, appurtenances and franchises to the Lehigh Company, and also assigned to the Lehigh Company its contract with the defendants. If the defendants are allowed the stipulated drawback, nothing is due from them for transportation.

*Vanatta*, Attorney General, and *B. Williamson*, for plaintiff.

*Thos. N. McCarter*, for defendants.

*DIXON, J.* . . . The plaintiff raises another and a most important question touching the validity of this contract, by a second replication to the second plea before mentioned, upon which no issue was joined, because of the judgment of the Supreme Court holding that plea bad. The main fact averred in the replication also appeared in evidence at the trial, and testimony as to some of the outlying circumstances was offered by the defendants, excluded and exception taken. On the argument before this court, the counsel for the plaintiff urged this main fact as necessarily invalidating the contract relied on by the defendants. This fact is, that at the time of the negotiations for, and the execution of, the contract in question, one of the defendants was a director of The Morris Canal and Banking Company — a trustee for it, to manage its affairs — and it is insisted that his relation to the company was, therefore, such that he was prohibited from entering into this contract with it, and that the contract is, *ipso facto*, void.

The position thus assumed by the plaintiff rests upon the broad principle that it was the duty of the director to so deal with the property and franchises of the corporation — to so manage its affairs as would most conduce to the corporate interest, and that he could not perform that duty while contracting with it in his own behalf, or if by possibility his own interest was consistent with the best interest of the company in so contracting, yet, so insidious are the promptings of selfishness and so great is the danger that it will over-ride duty when brought into conflict with it, that sound policy requires that such contracts should not be enforced or regarded. After an examination of all the cases cited, and such others as I have found, and a careful consideration of the principle and the results of regarding and of disregarding it, I have come to the conviction that the true legal rule is, that such a contract is not void, but voidable, to be avoided at the option of the *cestui que trust*, exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this. A director of a corporation may have rights not arising out of express contract — such as the right to pass over its railroad, or transport his goods over its canal, on paying reasonable tolls, or to have money which he has loaned it repaid to him; but where the right is one which must stand, if at all, upon an express contract, and

*This C was made by Co of mch of mas a sin*  
*RC is assignee of old C!*

*Plurges that C is bad on acct of sp partner*

*arg.*

*Rule*

*as to express C*



which does not arise by operation or implication of law, then he shall not hold it against the will of his *cestui que trust*; for in the very bargain which gave rise to it, in which he should have kept in view the interest of that *cestui que trust*, there intervened before his eyes the opposing interest of himself. The vice which inheres in the judgment of a judge in his own cause, contaminates the contract; the mind of the director or trustee is the forum in which he and his *cestui que trust* are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced, that judgment must fall. It matters not that the contract seems a fair one. Fraud is too cunning and evasive for courts to establish a rule that invites its presence. There may be isolated cases in which the trustee is willing to make a contract on more favorable terms for the *cestui que trust* than any one else, but the opportunities for self-advancement, at the expense of those whose concerns he has in charge, and under circumstances where concealment is easy, are so much more numerous than these isolated cases, that in declaring a rule the latter are not worthy of consideration. Nor is it proper for one of a board of directors to support his contract with his company, upon the ground that he abstained from participating as director in the negotiations for and final adoption of the bargains by his co-directors; the very words in which he asserts his right declare his wrong; he ought to have participated, and in the interest of the stockholders, and if he did not, and they have thereby suffered loss, of which they shall be the judges, he must restore the rights he has obtained — he must hold against them no advantage that he has got through neglect of his duty towards them. Many authorities exemplifying the rule may be found. I cite a few only:—

*York Building Ass. v. Mackenzie*, 8 Bro. P. C., 42 of Appendix — 4 Cr. & Stew. 378; *Aberdeen Railway Co. v. Blaikie*, 1 Macq. 461; *The York & M. N. R. Co. v. Hudson*, 16 Beav. 485; *Mulford v. Minch*, 3 Stockt. 16; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Cumberland Coal & Iron Co. v. Sherman et al.*, 30 Barb. 553; *Gardner v. Ogden et al.*, 22 N. Y. 327; *Butts v. Wood*, 37 N. Y. 317; *Michoud et al. v. Girod et al.*, 4 How. 503.

The application of the rule is most frequent in the relations between vendor and purchaser, but its reason and force extend to all agents and trustees, public and private. It has not always presented itself to the minds of judges in its full scope. At times they have been seduced into listening to suggestions that the circumstances of the special case showed the absence of fraud and over-reaching. At other times, they have intimated that the *cestui que trust* must seek his relief in equity; but the strongest intellects have enunciated the rule with its utmost vigor, and in its broadest extent.

The qualification, however, which the rule undoubtedly has, saves the case before us from its operation. The *cestui que trust* of the defendant director was not the plaintiff, but the Morris Canal and

Banking Company. The right of avoidance was one which belonged to that company and its stockholders, and not to the plaintiff. The act of 1871, empowering the canal company to lease, only authorized it to lease the canal, with its boats, property, works, appurtenances, and franchises; and under this power, it could scarcely transfer so peculiarly personal a privilege as this option to avoid a contract. Nor would a transfer of the contract, and all of the canal company's rights under it, carry this right of choice; for that does not spring out of the contract, but out of the fiduciary relation existing between the parties at the time the contract was made. And, moreover, the case shows that, after the lease to the plaintiff, and during all the time in which it is claimed the tolls sued for were accruing, the plaintiff dealt with the defendants on the basis of the binding efficacy of the contract.

*But right to  
avoid is  
personal n  
highly def. c.*

I conclude, therefore, that there appears before us no reason for refusing to give to this contract that force to which our construction of its terms entitles it, and that, upon the case before us, judgment should be rendered for the defendants below, the plaintiffs in error.

*For affirmance* — REED, WOODHULL — 2.

*For reversal* — THE CHANCELLOR, DIXON, KNAPP, CLEMENT, DODD, GREEN, LATHROP, WALES — 8.

(2) *Dealings by a Director with Third Parties.*

## PEARSON'S CASE.

1877. L. R. 5 Ch. Div. 336.

A DIRECTOR of a company received from one of the promoters a number of paid-up shares sufficient to qualify him as a director, and then took an active part in carrying out a conditional contract for the purchase by the company of a colliery belonging to the promoters, and for purchasing and working which the company was formed. Jessel, M. R., held that he must account to the company for the value of the shares, saying: That being the position of Sir Edwin Pearson, can he be allowed to say in a Court of Equity that he, having received a present of part of the purchase money, and being knowingly in the position of agent and trustee for the purchasers, can retain that present as against the actual purchasers? It appears to me that, upon the plainest principles of equity and good conscience, he cannot. Whether the purchase was or was not an advantageous one for the company, whether the property which they purchased at this large profit was or was not worth the increased price that they paid for it, is a question wholly immaterial for us to consider; he cannot, in the fiduciary position he occupied, retain for himself any benefit or advantage that he obtained under such circumstances. He must be deemed to have obtained it under circumstances which made him liable, at the option of the *cestuis que trust*, to account either for the value at the time of the present he was receiving, or to account for the thing itself and its proceeds if it had increased in value. The company elect on the present occasion to ask to charge him with the value of the twenty-five share warrants at the time of their delivery. 307, 314, 317

Director must use reasonable care, act in utmost good faith but is not liable for errors in judgment for x doing a co-direction in company to him in fact. He cannot be directly or indirectly an agent of his position must surrender to company all moneys or values he may receive

1. 4 Dec 386. 05712 (479); 105 Jan 268, 89. 2 Dec 1. 4 303 298; 103 20651; 687 10571. 4 28 Jan 265

Most fiduciaries must surrender benefit any bargain they make in connection with the business of the corporation.

SEYMOUR v. SPRING & CO. ASSOCIATION.

1895. 144 New York, 333.<sup>1</sup>

FINCH, J. . . . But the further claim is made that, because Hotchkiss and Seymour were officers of the corporation, holding a fiduciary relation as trustees or directors, they could not lawfully buy the valid and outstanding obligations of the company at less than par and enforce them for the full amount against the debtors. If that be sound doctrine, as is stoutly maintained, if directors cannot in any case invest in the bonds of their own companies except at the peril of a constructive fraud, if they cannot safely buy such bonds below par, because they deem them unduly depressed, if titles to corporate obligations passing through their hands become tainted by their touch, it is quite time that the courts should give, what they have not given, a very definite and distinct warning. Some citations of seeming authority are pressed upon us and others exist. The broad rule is stated in *Perry on Trusts* (§ 428), that "a trustee, executor or assignee cannot buy up a debt or incumbrance to which the trust estate is liable for less than is actually due thereon, and make a profit to himself," and that is the doctrine invoked in this case as applicable to a director regarded as a trustee of the corporation. But the statement, however correct in its application to specific instances, must be taken with the limitations which belong to it. Its foundation is that a fiduciary agent, owing a duty to his principal, cannot make a contract for his own benefit which is or may be inconsistent with that duty, and the cases generally are of two kinds. The trustee buys in the property of his principal at a sacrifice for his own benefit, when, if he bought it at all, it was his duty to do it for his principal, or he makes a contract in behalf of his principal with himself directly or indirectly as the other party to the agreement. The first class of cases is illustrated by *Slade v. Van Vechten* (11 Paige, 26), where the assignee bought in assigned property at a sheriff's sale and claimed the personal benefit of his bargain; and the second class by *Munson v. S. G. & C. R. R. Co.* (103 N. Y. 58), in which the directors contracting had a private and personal interest, possibly adverse to their fiduciary duty. Almost, if not quite all, of the cases cited by the learned counsel for the appellant belong to one or the other of these two classes. But they do not decide this case, for Hotchkiss and Seymour neither bought in any property of the company nor dealt with the corporation in any respect. They made their contract, not with it, but with third persons capable of protecting their own rights, and bought nothing which the corporation owned or to which it had a right. We must go to still other cases, founded it may be to some extent upon similar ideas of fiduciary duty, to discover even an ap-

<sup>1</sup> Statement and arguments omitted. Only part of the opinion is given. — Ed.

Can they buy valid oblig. Co at disc. & inf. for app. oblig. on mat. wh.

The complete res. trust. analogy

A trustee can't buy in prop. his except sh. He can't C for p. se.

This is neither case nor hot prop. Calv.

proximate authority. There are cases of co-partnership in which the general rules pertaining to that specific relation might prove to be broad enough to cover the purchase of the debt owing by the firm (*Am. Bk. Note Co. v. Edson*, 56 Barb. 89), and other cases in which the duties flowing from a liquidation conducted by the trustee, and as to which he owes a specific trust duty, forbid a purchase by the trustee for his own benefit at a discount. But in every class of cases the rule is founded upon the unwillingness of the law to uphold contracts which bring into collision the trust duty and the personal interest, and it is because of that collision, and the temptations which surround it, that it declares the contract voidable at the election of the beneficiary without investigating the good or bad faith of the trustee. The entire basis of the rule consists in this collision between trust duty and personal interest, and the equitable prohibition has no application where there is no such possible inconsistency. There is no such conflict in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations. There is no present duty resting upon him to extinguish them. The time for that has not come, the duty has not arisen, may never arise, the corporation is not prepared to pay, does not contemplate paying, but intends and expects to await the full maturity of the debt. Unless some special fund has been provided, or some special liquidation has been ordered, the director owes no duty to his company to discharge or buy in the outstanding bonds, and may purchase for himself because no inconsistent trust duty has arisen. Why should he not? While the bonds are running to their maturity, and the corporation is not able to extinguish them, is not bound to do so, does not even wish or seek to do so, what does it matter who holds the securities or on what terms they pass from hand to hand? It seems to me that we are asked to crowd the rule almost to the verge of an absurdity, and to inflict a vital injury upon business interests by tainting with invalidity the holding by a director of the unmatured obligations of the corporation bought by him in the open market and not put in liquidation or sought to be extinguished. There must at least be some fact or circumstance which charges the trustee with a present duty to act for his company in respect to the bonds, which duty is or may be inconsistent with a personal purchase. No such duty rested upon Hotchkiss and Seymour, and they had a right to buy and hold for their own benefit.

Indeed, there is a further and equally conclusive answer. If the doctrine invoked applied to this case it would make the purchase not void but voidable at the election of the corporation, and that election must be made promptly and upon sufficient knowledge of the facts. The beneficiary cannot wait and speculate upon the chances of delay, but must act. Here the purchase was made before 1873, and in 1880 the corporation is found recognizing and ratifying the title of the vendees or their successors, making payments to them, and providing for future payments, and it is only after a delay of fifteen years that an attempt to repudiate the purchase is made. 2. 212 - 217, 209.

cf. 66 AL 1322; 11 AL 81-3; 36 Kan 51; 109 Mo 355 acc. *cf. supra*.

"One may buy corp prop on aux" sale on jst held by them. Ord. for corp ednot. 35286 250  
 One may be a mtg on corp prop & purchase 11th Dec 426; 105 Tenn 268 contra. 1881 113  
 War? may buy at pub. auction. 222 or for by 30 or 40 order. trustee of 1/2 all 79 min 188  
 77 Ill 226 but 1884 224, 214, 214. But these sales may be set aside if the has been  
 fully. 110 or under 110 min 110 56 Dec 172.

basis: rule  
 Conflict: duty

None here

Even the Co  
 reaf. v. Co  
 on promp  
 elect

(v) Do Directors stand in a Fiduciary Relation to the Shareholders individually? cf 485 2 Clf 267  
Part. No. 3, dir may deal at arms length  
↓  
PERCIVAL v. WRIGHT. 8 Much 2 R 267. JH Wadg

[1902] 2 Ch. 421.

THIS was an action to set aside a sale of shares in a limited company, on the ground that the purchasers, being directors, ought to have informed their vendor shareholders of certain pending negotiations for the sale of the company's undertaking.

In and prior to October, 1900, the plaintiffs were the joint registered owners of 253 shares of £10 each (with £9 8s. paid up) in a colliery company called Nixon's Navigation Company, Limited.

The objects of the company, as defined by the memorandum of association, included the disposal by sale of all or any of the property of the company. The board of directors were empowered to exercise all powers not declared to be exercisable by general meetings; but no sale of the company's collieries could be made without the sanction of a special resolution.

The shares of the company, which were in few hands and were transferable only with the approval of the board of directors, had no market price and were not quoted on the Stock Exchange.

On October 8, 1900, the plaintiffs' solicitors wrote to the secretary of the company asking if he knew of any one disposed to purchase shares.

On October 15, 1900, in answer to the secretary's inquiry as to what price they were prepared to accept, the plaintiffs' solicitors wrote stating that the plaintiffs would be disposed to entertain offers of £12 5s. per share. This price was based on a valuation which the plaintiffs had obtained from independent valuers some months previously.

On October 17, 1900, the chairman of the company wrote to the plaintiffs' solicitors stating that their letter of October 15 had been handed to him, and that he would take the shares at £12 5s.

On October 20, 1900, the plaintiffs' solicitors having taken a fresh valuation, replied that the plaintiffs were prepared to accept £12 10s. per share.

On October 22, 1900, the chairman wrote accepting that offer, and stating that the shares would be divided into three lots.

On October 24, 1900, the chairman wrote stating that eighty-five shares were to be transferred to himself and eighty-four shares apiece to two other named directors.

The transfers having been approved by the board, the transaction was completed.

The plaintiffs subsequently discovered that, prior to and during their own negotiations for sale, the chairman and the board were

being approached by one Holden with a view to the purchase of the entire undertaking of the company, which Holden wished to resell at a profit to a new company. Various prices were successively suggested by Holden, all of which represented considerably over £12 10s. per share; but no firm offer was ever made which the board could lay before the shareholders, and the negotiations ultimately proved abortive. The court was not in fact satisfied on the evidence that the board ever intended to sell.

The plaintiffs brought this action against the chairman and the two other purchasing directors, asking to have the sale set aside on the ground that the defendants as directors ought to have disclosed the negotiations with Holden when treating for the purchase of the plaintiffs' shares.

SWINFEN EADY, J. The position of the directors of a company has often been considered and explained by many eminent equity judges. In *Great Eastern Ry. Co. v. Turner*,<sup>1</sup> Lord Selborne, L. C., points out the twofold position which directors fill. He says: "The directors are the mere trustees or agents of the company, — trustees of the company's money and property, — agents in the transactions which they enter into on behalf of the company." In *In re Forest of Dean Coal Mining Co.*,<sup>2</sup> Jessel, M. R., says: "Again, directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company. The company is the creditor, and, as I said before, they are only the managing partners." Again, in *In re Lands Allotment Co.*,<sup>3</sup> Lindley, L. J., says: "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees, and it has always been held that they are not entitled to the benefit of the old Statute of Limitations because they have committed breaches of trust, and are in respect of such moneys to be treated as trustees."

It was from this point of view that *York and North Midland Ry. Co. v. Hudson*<sup>4</sup> and *Parker v. McKenna*<sup>5</sup> were decided. Directors must dispose of their company's shares on the best terms obtainable, and must not allot them to themselves or their friends at a lower price in order to obtain a personal benefit. They must act *bona fide* for the interests of the company.

The plaintiffs' contention in the present case goes far beyond this. It is urged that the directors hold a fiduciary position as trustees for the individual shareholders, and that, where negotiations for sale of

<sup>1</sup> (1872) L. R. 8 Ch. 149, 152.

<sup>2</sup> (1878) 10 Ch. D. 450, 453.

<sup>3</sup> [1894] 1 Ch. 616, 631.

<sup>4</sup> 16 Beav. 485, 491, 496.

<sup>5</sup> (1874) L. R. 10 Ch. 96.

the undertaking are on foot, they are in the position of trustees for sale. The plaintiffs admitted that this fiduciary position did not stand in the way of any dealing between a director and a shareholder before the question of sale of the undertaking had arisen, but contended that as soon as that question arose the position was altered. No authority was cited for that proposition, and I am unable to adopt the view that any line should be drawn at that point. It is contended that a shareholder knows that the directors are managing the business of the company in the ordinary course of management, and impliedly releases them from any obligation to disclose any information so acquired. That is to say, a director purchasing shares need not disclose a large casual profit, the discovery of a new vein, or the prospect of a good dividend in the immediate future, and similarly a director selling shares need not disclose losses, these being merely incidents in the ordinary course of management. But it is urged that, as soon as negotiations for the sale of the undertaking are on foot, the position is altered. Why? The true rule is that a shareholder is fixed with knowledge of all the directors' powers, and has no more reason to assume that they are not negotiating a sale of the undertaking than to assume that they are not exercising any other power. It was strenuously urged that, though incorporation affected the relations of the shareholders to the external world, the company thereby becoming a distinct entity, the position of the shareholders *inter se* was not affected, and was the same as that of partners or shareholders in an unincorporated company. I am unable to adopt that view. I am therefore of opinion that the purchasing directors were under no obligation to disclose to their vendor shareholders the negotiations which ultimately proved abortive. The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interests of the company. I am of opinion that directors are not in that position.

There is no question of unfair dealing in this case. The directors did not approach the shareholders with the view of obtaining their shares. The shareholders approached the directors, and named the price at which they were desirous of selling. The plaintiffs' case wholly fails, and must be dismissed with costs. 507, 517

of 213 US 419. If it were conceded that the relation is such a fiduciary nature as to make it duty, due to disclose to shareholders and know who has purchased regarding the shares by the purchases yet there are cases due by reason of facts such that duty does not arise. "Of was a dir. (1) Bought the stock (2) Was admin<sup>r</sup> general & had large power (3) Was engaged in negotiations finally led to a sale at a price not fully enhanced, &c. stock. (5) Was chief negotiator (6) Was acting substantially as an agent of reason & the owners of shares & acquired, other stock. (7) Negotiated for sale of whole corp. (8) The case was only with assets owned by corp. The extent of these facts make "such a combination considered it: plaintiff's duty of disclosure"

cf Malham v Staunton, 111 Me 322, 1868 "This I got no benefit, & sale to us, yet he stood in a fiduciary position towards us, & was a party to, for the as well as if it was liable to us for real &c shares."

Admission

Reason



of was Pres. & Co. paid of us no more in bus. manifest act for benefit all, Kipmus  
had lost & omitted certain assets, statement, Co. Dec'd no due Kipmus' to believe  
was minimum selling price.

## OLIVER v. OLIVER.

1903. 118 Georgia, 362.

THE petition was against John Oliver and the Gate City Oil Company. These facts appear from it: John Oliver is a brother of the petitioners. He resides in Georgia, where the defendant company has its principal place of business, and they reside in New York. For a number of years all the brothers have been engaged together in various business enterprises in different parts of the country, and in all their enterprises their plan has been that each brother should be interested to the same extent as each of the others. John Oliver sold their stock in one of these enterprises, which was held by them as a firm under the name of Oliver Brothers, and of which he had the management, and organized the defendant company, subscribing to its stock in the firm name but causing the stock to be issued in equal proportions to the members of the firm. The petitioners left entirely to him the investment of the funds used for this purpose, and the management of the stock and of the company's affairs. He was the president of the company. While occupying that position he sought and obtained from the petitioners options on their holdings in the company, at \$110 per share, alleging as a reason for so doing that there was no longer any profit in the business; that the increased number of small oil mills being built at cottonseed points rendered it more difficult for the larger companies to make dividends; that there might be an opportunity to sell out the plant at a fair price, and he wanted to be in a position where it could be sold if such an opportunity offered, the sale to be for the equal benefit of all the stockholders of the company. In June, 1901, he mailed to them a statement of the affairs of the company, showing that it had been losing money that year. In view of this statement and of the fact that no dividends were declared, and not knowing of the existence of certain assets omitted from the statement, and believing that the options were to be used for the purpose for which they were obtained, — "that is, of selling the plant for an amount not less than \$110 per share, and, if more than that amount, that the price still would inure to the benefit of all parties concerned," they "allowed the options to continue." The petition alleges that by these options "John Oliver was in reality constituted the agent of the petitioners for the purpose of delivering over their shares of the capital stock of the . . . company to such purchaser as might propose to purchase the plant upon terms which he might deem advantageous, netting the petitioners not less than \$110 per share, and the petitioners sharing with the other stockholders upon equal terms in all amounts realized by such sale to be made by . . . John Oliver as the agent of petitioners." "John Oliver wrote the option and fixed therein the valuation himself, which . . . petitioners did not question, for the

reason that it was considered simply as a minimum sum at which the stock would be parted with, [he] to get the best he could above that for [them] and for himself." The options were without consideration. When they were given, or at the time of the last renewal of them, John Oliver had begun negotiations which he concealed from the petitioners and which resulted in the sale, in August, 1901, of the plant and a part of the other assets of the company to the Virginia-Carolina Chemical Company, for a sum which, together with the remaining assets, made the stock worth very much more than \$110 per share. According to the petition, the true value at that time was \$185 per share, and was admitted by John Oliver to be \$140 per share. In this sale he acted for the defendant company and as its president. When the trade was about to be consummated he borrowed money to pay the petitioners for their stock, had it transferred to himself on the books of the company, and bought other stock until he and Fred. Oliver, another brother, were the only stockholders on the books; and, on the consummation of the sale, he had the company pay the stockholders of record \$1.10 on the dollar of the stock, and used this money to repay the loan.

The petition alleges that when John Oliver took to himself the stock of the petitioners under the options, he violated the agency which had been created for him; that he committed a fraud on them by misleading them as to the purpose for which he wanted the options, and in giving them incorrect information of the affairs of the company (he then acting as president and giving the information to them as stockholders), which information showed the company to be worth less money than it was, and misled them in the sale of their stock; and further, by withholding from them, while occupying to them a relation of trust, information to which they were entitled and which made their stock more valuable, using this information to his own gain and trading upon it as against them; and that this was done in pursuance of an understanding between himself and Fred. Oliver, by which Fred. Oliver would reap a like advantage in dealing with the Charlotte Oil and Fertilizer Company, Fred. Oliver having procured from them, for similar purposes, options on their stock in that company. It is alleged that on account of these facts the title to the stock in question did not pass out of the petitioners, and they are still stockholders of the defendant company; that the affairs of the company are controlled by John Oliver and Fred. Oliver, who claim to be the sole stockholders, to the exclusion of the petitioners; that they have demanded of John Oliver, as president of the company and as its majority stockholder, that he give them access to the books of the company and information as to its assets, and that the dividends to which they are entitled be paid to them; but he refuses to give them any information as to the condition of the company or to allow them a voice in its management, and proposes to distribute the assets, in a manner unknown to the petitioners, between himself and Fred. Oliver, who is a non-resident of

the State; that John Oliver, acting in collusion with Fred. Oliver, has illegally and fraudulently caused a resolution to be entered on the minutes of the company, directing it to pay himself \$50,000, for the alleged consideration that he had agreed to remain out of the oil business for five years; and that he is wasting the assets and mismanaging the affairs of the company in other respects stated. The petitioners aver their willingness to tender back and pay to John Oliver the money paid by him to them for their stock, provided he returns to the defendant company the money paid by it to him, "and to render an account of said stock." They pray for an order restraining the defendant company from paying out any money, and restraining John Oliver from disposing of the stock of the company, held or claimed by him; that the company be required to allow them access to its books of accounts, stock books, and minute book, for examination; that a receiver be appointed to take charge of the assets of the company and to wind up its affairs and distribute its assets; that John Oliver be required to return to them the shares of stock in question, and that the transfer of these shares on the books of the company be cancelled; that the options be cancelled; that the defendant corporation and John Oliver jointly and severally be required to account to them for the value of the stock, and that the petitioners have judgment for such sum as may be found to be due them on account of the stock and on account of any dividends declared on it; also for general relief. By an amendment they prayed that the options be reformed by inserting in them certain provisions which they alleged were understood by the parties to be a part of the contract but were omitted by mistake, to wit: that John Oliver will sell this stock at not less than \$110 per share, and will account to the grantor of this option for any sum over that amount; this option being given to enable him to make a sale of the plant and property of said company.

The defendants demurred to the petition, on the grounds: (1) It sets out no cause of action. (2) There is no equity in it. (3) The allegations do not entitle the plaintiffs to the relief prayed for. (4) It appears from the petition that the plaintiffs gave unconditional options, agreeing to sell the stock at a fixed price, and that John Oliver availed himself of the options and paid for the stock in accordance with the terms thereof; and no sufficient reason in law is alleged why the contract of sale should be reformed. (5) The allegations as to agency on the part of John Oliver to sell the stock for the benefit of the plaintiffs are at variance with the terms of the contract of sale, and cannot be considered for the purpose of so varying the agreement; and the allegations on this subject do not entitle the plaintiffs to set aside the sales. (6) The petition contains no sufficient allegations of fraud which would authorize the rescission of the sale of the stock, and no allegations sufficient to create a resulting trust. (7) The allegations do not entitle the plaintiffs to a restraining order or a receiver. (8) There is a misjoinder of parties defendant, in that the allegations do not render

the Gate City Oil Company a proper party. The court sustained the fourth ground of the demurrer and struck the prayer for reformation, but overruled the other grounds. The defendants excepted.

*Anderson, Anderson & Thomas and J. H. Porter*, for plaintiffs in error. *Robert C. Alston and F. G. DuBignon*, contra.

LAMAR, J. Courts are created for the enforcement of civil contracts, and are powerless to relieve against hard bargains, unless authorized so to do by some rule of civil law. From the very nature of their constitution, they must accommodate themselves to the general transactions of mankind; they cannot put parties upon an equality which does not in fact exist; they cannot deprive one of the advantage which superior judgment, greater skill, or wider information may give; nor can they be expected to enter upon an inquiry as to how the parties would have traded if each had known the same facts as to the state of the crops, the conditions of trade, a declaration of war, the signing of a treaty of peace, or any speculative matter or extrinsic fact of general or special knowledge. Hence, in *Laidlaw v. Organ*, 2 Wheat. 178, it was held that a purchaser of tobacco was not bound to disclose to the vendor that peace had been declared between this country and Great Britain, although that fact materially affected the value of the commodity sold; Chief Justice Marshall saying that "It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties." Contra, *Frazer v. Gervais*, Walk. (Miss.) 72; *Bowman v. Bates*, 2 Bibb. 47. See *Abbott v. Dermott*, 34 Ga. 228; *Ellis v. Hammond*, 57 Ga. 179 (2). Without making the distinction between extrinsic and intrinsic facts apparently recognized by our Civil Code, § 3534, par. 4, and many American cases, Lord Thurlow said, in *Fox v. Mackreth*, 2 Bro. C. C. 420, that the court would not set aside a sale where the purchaser failed to divulge the fact, of which he knew the seller was ignorant, that the estate had upon it a valuable mine, unless the relation between the parties was such as to raise an obligation on the part of the vendee to make the discovery. See also *Davies v. London Ins. Co.*, 8 Ch. Div. 469; *Turner v. Harvey*, Jac. 178; 2 Pom. Eq. Jur. (2d ed.) § 903; 2 Kent's Com. 482, 490, 491 n.; *Williams v. Spurr*, 24 Mich. 335; *Lapish v. Wells*, 6 Maine, 183; *Bowman v. Bates*, 2 Bibb, 47.

And this brings us to a consideration of the relation which a director bears to an individual stockholder. All the authorities agree that he is trustee for the company, and in his capacity as such he serves the interest of the entire body of stockholders, as well as those of the individual shareholder, who usually cannot sue in his own name for wrongs done the company by the officer. Civil Code, §§ 1858, 1859, 1860. But the fact that he is trustee for all is not to be perverted into holding that he is under no obligation to each; the fact that he must serve the company does not warrant him in becoming the active and successful opponent of an individual stockholder with reference to the latter's undivided interest in the very property committed to the direc-

tor's care. That he is primarily trustee for the corporation is not intended to make the artificial entity a fetich to be worshipped in the sacrifice of those who, in the last analysis, are the real parties at interest. No process of reasoning and no amount of argument can destroy the fact that the director is, in a most important and legitimate sense, trustee for the stockholder. *Jackson v. Ludeling*, 21 Wall. 616; 2 Pom. Eq. Jur. (2d ed.) § 1090. Not a strict trustee, since he does not hold title to the shares; not even a strict trustee who is practically prohibited from dealing with his *cestui que trust*; but a quasi trustee as to the shareholder's interest in the shares. If the market or contract price of the stock should be different from the book value, he would be under no legal obligation to call special attention to that fact; for the stockholder is entitled to examine the books, and this source of information, at least theoretically, is equally accessible to both. It might be that the director is in possession of information which his duty to the company requires him to keep secret; and if so, he must not disclose the fact even to the shareholder; for his obligation to the company overrides that to an individual holder of the stock. But if the fact so known to the director cannot be published, it does not follow that he may use it to his own advantage, and to the disadvantage of one whom he also represents. The very fact that he cannot disclose prevents him from dealing with one who does not know, and to whom material information cannot be made known. If, however, the fact within the knowledge of the director is of a character calculated to affect the selling price, and can, without detriment to the interest of the company, be imparted to the shareholder, the director, before he buys, is bound to make a full disclosure. In a certain sense the information is a quasi asset of the company, and the shareholder is as much entitled to the advantage of that sort of an asset as to any other regularly entered on the list of the company's holdings. If the officer should purposely conceal from a stockholder information as to the existence of valuable property belonging to the company, and take advantage of this concealment, the sale would necessarily be set aside. The same result would logically follow where the fact giving value to the stock was of a character which could not formally be entered on the records. Where the director obtains the information giving added value to the stock by virtue of his official position, he holds the information in trust for the benefit of those who placed him where this knowledge was obtained, in the well-founded expectation that the same should be used first for the company, and ultimately for those who were the real owners of the company. The director cannot deal on this information to the prejudice of the artificial being which is called the corporation, nor on any sound principle can he be permitted to act differently towards those who are not artificially, but actually interested.

There are several authorities directly on the point. Some are at law, others in equity; the decisions were based on a finding of a want

limits his future  
duty

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of actual fraud; and not on demurrer, as here. But it must be conceded that they are opposed to the conclusions we have reached. *Krumhaar v. Griffiths*, 25 Atl. R. 64; *Haarstick v. Fox*, 9 Utah, 110; *Crowell v. Jackson*, 53 N. J. L. 656, adopting the ruling in *Board of Comm'rs v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245, where it was held that there was no relation of trust between a director and an individual stockholder; and that therefore the director was not bound, when purchasing the stock, to disclose to the shareholder facts, knowledge of which was acquired through his official position, although they were of a character which materially and largely affected the value of the stock. There, however, the Chief Justice dissented on the ground that a director does occupy a relation of trust, which makes him guilty of constructive fraud in acquiring the stock without disclosing facts which enhanced its value. The case has been doubted by Judge Thompson, who prefers the dissenting opinion, saying that the decision of the majority "proceeds upon a conception which, if extended, would sanction nearly all the fraud and injustice which the managers of corporations have committed against the stockholders." 3 Thomp. Corp. 4034; Corbin's Benj. Sales, § 624. And in 2 Pomero's Eq. Jur. (2d ed.) § 1090, it is shown that directors are not only trustees of the corporation, but also "quasi or sub modo trustees for the stockholders with respect to their shares of stock." If, then, any sort of trustees, they are necessarily subject to the obligations and restrictions which inhere in that relation, as to property intrusted to them. The shares are but the paper evidence of the interest which the stockholder has in the property under the control of the director. In their sale the stockholder disposes, not only of the lithographed or engraved script, but of his holdings in property. And when the director deals with a stockholder for the purchase of shares, he is not buying paper, but in effect is buying an undivided and substantial interest in property which has been committed to the director's care, custody, and control. Equity abhors mere names, and looks to the substance. Whether the corporation be treated as an enlarged and amplified form of partnership and the director as managing partner, or whether he is called an agent or trustee elected by the stockholders to represent them in the management of the concern, he occupies a fiduciary position, and is essentially within the rule which requires agents, attorneys, bailees, partners, trustees, or other fiduciaries to exercise the highest degree of good faith as to all matters connected with the property committed to their care. 2 Pom. Eq. Jur. (2d ed.) § 963; *Stubinger v. Frey*, 116 Ga. 396.

It is matter of common knowledge that the market value of shares rises and falls, not only because of an increase or decrease in tangible property, but by reason of real or contemplated action on the part of managing officers; declaring or passing dividends; the making of fortunate or unfortunate contracts; the loss or gain of property in dispute; profitable or disadvantageous sales or leases. And to say

In *Strong v. Repide*. Of course his dominating position, & benefit of Corp. not to depress  
its shares but he concealed actively (by taking steps) his own identity as purchaser  
& passively as real v. & prop.

that a director who has been placed where he himself may raise or depress the value of the stock, or in a position where he first knows of facts which may produce that result, may take advantage thereof, and buy from or sell to one whom he is directly representing, without making a full disclosure and putting the stockholder on an equality of knowledge as to these facts, would offer a premium for faithless silence, and give a reward for the suppression of truth. It would sanction concealment by one who is bound to speak, and permit him to take advantage of his own wrong — a thing abhorrent to a court of conscience. It is conceded that the position which the director occupies prevents him from making personal gains at the expense of the company, or of the whole body of stockholders. But a rule that he is not trustee for the individual shareholders leads inevitably to the conclusion that while a director is bound to serve stockholders *en masse*, he may antagonize them one by one; that he is an officer of the company, but may be the foe of each private in the ranks. When it is admitted, as it must be, both from the very nature of his duty and from the rulings of nearly all the cases, that he is trustee for the shareholder, how is it possible in principle to draw the line and say that while trustee for some purposes, he is not for others immediately connected therewith? that the incidents of the trust relation stop short at the very point where it is vitally important to the shareholders that they should become active? For it must not be forgotten that the right to good faith in dealings concerning the stock is one of the very few which the individual shareholder is in a position to assert in his own name. Except in a few other instances, the company itself is the only proper party to enforce the obligation arising from the trust relation of the director. In contracts with reference to the shares, the stockholder himself can enforce the rights arising from the quasi trust. Civil Code, §§ 1858, 1859, 1860.

While not decided, it is in one case suggested that a stockholder in dealing with a director should recognize his superior opportunities for knowledge, and be warned thereby to exercise special caution. But the fiduciary relation fully warrants exactly the opposite course. Here, at least, the beneficiary may be off guard, and may rely implicitly, not only on what is said, but also on the supposition that nothing important will be left unsaid by the officer. Having previously trusted the director in the management of the company, he is not required, when selling his shares, suddenly to exhibit entire want of confidence. And directors generally recognize the obligations imposed, and act accordingly. But the peculiar powers and special opportunities of these fiduciaries call for an enlargement rather than a restriction of the rule requiring disclosures. Civil Code, §§ 4027, 3534. The obligations of his office bring him peculiarly within the general doctrine which declares that concealment of material facts may of itself amount to a fraud, where from any reason one has the right to expect full information from another, or where one knows

48/1729.  
cc: 218, 2219, 2226, 2229, 2235

Basic arg: lesser rule: deprive a dir of a vote in other sh. have 100% of m open mkt, / lesser mkt for shares, require constant information to be given whenever sh. makes to buy as well as to sell & of losses as well as gains.

that the other is laboring under a delusion in respect to the property sold, and yet keep silence. Civil Code, §§ 3534, 4030, 4031. "A suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation."

*Stewart v. Wyoming Ranch Co.*, 128 U. S. 388. See also *Fisher v. Budlong*, 10 R. I. 525; *Bowman v. Patrick*, 36 Fed. Rep. 138 (2); *Goodson v. Trust* *Colton v. Stanford*, 82 Cal. 351; *Walsham v. Stainton*, 1 DeGex, J. & S. 678; *Porter v. Woodruff*, 9 N. J. Eq. 174; *Laidlaw v. Organ*, 2 Wheat. 178; *Kintzing v. McElrath*, 5 Pa. St. 467; 2 Pom. Eq. Jur. (2d ed.) §§ 902, 903, 963, 1090.

We base our decision on the obligation raised by the relation of director and stockholder, having purposely refrained from considering the effect of the fact that the defendant is the brother of the petitioners, which, though apparent in the record, was not pressed in the briefs or arguments here.

Judgment affirmed. By *five Justices*.

Cases grouped by Milgus - Cases in mkt

1. Misrep<sup>n</sup> of a material fact was made by purchase of a directly to sell sh. (73 Cal. 461)
2. False reports or other false statements, facts or partial or complete statements intentional made to public or to corp. or mkt. injured party has relied *Oliver v. 69 Kan. 498*; 1 m apply to line who sell to sh (142 N.Y. 581)
3. False statements designed to induce action were made but not relied on, or party relied on his own indept investm<sup>t</sup> or had equal knowl<sup>d</sup> or equal opp<sup>t</sup> to know, or rep<sup>d</sup> didn't relate to a exact fact but only to a future conting<sup>t</sup> *132 Wash 528*; *Brennan v. 215 Ill. 444*; *197 Pa. 423*; *100 P. 1094* & 100 Md. 543, but cf *126 N.Y. App. Div. 257*
4. Full disclosure of all material facts. *208 Mo. 426*
5. Purchase of shares has been made: special agt. & sh. to sell. *109 S.W. 688* & cf *Oliver*
6. Fict<sup>l</sup> misapprop<sup>r</sup> of corp funds by shs, & conceal<sup>t</sup> of fact in depress<sup>d</sup> shares so as to purchase & value *793 S.W. 22*; *167 Ill. 549* & *73 Atl. 451* cf *63 Q. 324* & *43 Wash. 43*

7 Conceal<sup>t</sup>.

a) Active by mislead<sup>d</sup> reports - *Oliver v. 69 Kan. 498*

b) Passive reliance merely

1. as to existing condns or future prospects. *Co. 53 N.J. 656*
2. As to completed or pending sale, at all, & prop. *11; 167 Ill. 549*
3. As to existence of conflict<sup>d</sup> interests or an indept collat<sup>d</sup> agreement neither of them in the cited cases injur<sup>d</sup> & sell<sup>d</sup> sh. *109 S.W. 688* *130 N.J. 451*
4. As to identity of purchase<sup>r</sup> officer. *213 U.S. 419* cf *208 Mo. 426*

Conclusion: Liability for actual fraud; for abuse of confidence, a special agency for not act<sup>d</sup> affecting corp. shares, concealed prop<sup>r</sup> purchase at depressed V. or for what cases call active or intent<sup>d</sup> concealment. *53 N.J. 656*; *126 N.Y. App. Div. 257*



Unl. Regs. The R. & A. in Reg. a Corp. Shumwood Case says  
R. & A. inspect 1 Clf 2062 extends up to N 4/497 Co. de 589 - but rule at Clf extends  
to corp prop as full as 1 Clf 2062

## CHAPTER III.

RIGHTS OF A SHAREHOLDER, EVEN IF HE IS IN THE  
MINORITY.(A) *To inspect the Corporate Books and Records. 2181*

## GUTHRIE v. HARKNESS.

1905. 199 *United States*, 148.

sub own 1/5 Clf  
asks leave to  
inspect  
same reason

THE defendant in error was the owner of nearly one fifth of the capital stock of the Commercial National Bank of Ogden, Utah. As such shareholder he applied for leave to inspect the books, accounts, and loans of the bank, which was refused him. He alleges the reasons for seeking such inspection to be that he might ascertain the value of his stock in the bank and whether the business affairs of the same had been conducted according to law. He charges that loans had been made to patrons of the bank of more than one tenth of the capital stock, in violation of law, and that an inspection of the books, accounts, and loans of the bank would reveal other irregularities. Upon the hearing in the District Court the following findings of fact were made:—

"1. That the Commercial National Bank of Ogden, Utah, is a corporation organized and existing under and by virtue of the laws of the United States; that said corporation is doing a banking business in Ogden City, Weber County, State of Utah; that the capital stock of said bank is \$100,000, divided into 1000 shares of the par value of \$100.00 per share.

"2. That the defendants are directors and have under their control and in their possession all books, papers, accounts, and loans of said Commercial National Bank.

"3. That there is no acting cashier of said bank, and that there has been no such cashier since the first day of November, 1902; that J. W. Guthrie is president; A. R. Heywood, vice-president, and R. T. Hume is assistant cashier of said bank.

"4. That on or about the first day of February, 1903, plaintiff made a demand upon said directors at the banking house of said bank and also upon J. W. Guthrie as president, A. R. Heywood as vice-president and general manager of said bank, and upon R. T. Hume as assistant cashier of said bank, for permission to permit plaintiff to inspect all books, accounts, and loans of the said bank, and plaintiff made demand

for such inspection at such time or times as would not interfere with the proper conducting and operating of said bank.

"5. That each and all of said persons refused permission to plaintiff to inspect the said books, accounts, and loans of said bank at any time or at all, and they still refuse to permit such inspection.

"6. That the plaintiff is the owner and has in his possession 183½ shares of the capital stock of said bank of the par value of \$18,333.33, and that said stock appears on the stock books of said bank in the name of the said plaintiff.

"7. That plaintiff sought and now seeks the inspection of the books, accounts, and loans of said bank for the purpose of ascertaining the true financial condition of said bank and also for the purpose of ascertaining the value of his stock in said bank, and also for the purpose of ascertaining whether the business affairs of the said bank have been conducted according to law.

"The court further finds that sufficient reason exists for the inspection of said books and accounts of said bank."

Upon this finding the court entered a judgment requiring the defendants to permit the plaintiff to inspect the books, accounts, and loans of the bank at such time or times as would not interfere with the business of the bank.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

While the State has no power to enact legislation contravening the Federal laws for the control of national banks, *Davis v. Savings Bank*, 161 U. S. 275, Congress has provided that for actions against them at law or in equity they shall be deemed citizens of the State in which they are located, and that in such cases the Circuit and District Courts of the United States shall have such jurisdiction only as they would have in cases between individual citizens of the same State. 25 Stat. 433. If the stockholders had the legal right to enforce inspection, there is no room to question the authority of the state courts to enforce the right granting the proper relief in a judicial proceeding. *Petri v. Commercial Bank*, 142 U. S. 644; *Continental National Bank v. Buford*, 191 U. S. 119, 123.

Upon review in the Supreme Court of Utah, the judgment of the District Court was affirmed, it being held that it was the common law right of the shareholder to have the inspection demanded, and that the same had not been cut down by the act of Congress regulating the business of national banks. 27 Utah, 248.

There can be no question that the decisive weight of American authority recognizes the common law right of the shareholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member. Morawetz in his work on Corporations, section 473, says:—

"However, in the United States the prevailing doctrine appears to be that the individual shareholders in a corporation have the same

*limited*

right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the management."

In many of the states this right has been recognized in statutes which are generally held to be merely in affirmance of the common law. Nor do we find the authorities making an exception as to this right when a corporation which does a banking business is the subject of consideration. It is said to be customary for banking companies in England to insert in their constitutions a provision forbidding the inspection of customers' accounts by shareholders or creditors. *Morgan's Case*, L. R. 28 Ch. D. 620 (1885); *Cook Corp.* § 517 note. The subject appears to be now regulated by statute in England. *Cook Corp.* § 518. In *Cockburn v. Union Bank of Louisiana*, 13 La. Ann. 289, it was held that a stockholder in the Union Bank of Louisiana had the right to a writ of mandamus to compel the officers of the bank to allow him the privilege of inspecting the discount books of the bank within proper and reasonable hours, and in the course of the opinion it was said:—

"A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by the charter or the law of the land; as long as the charter or the rules and by-laws, passed in conformity thereto, and the law, do not restrict his individual rights, he possesses them in full and can demand to exercise them. It cannot be denied that it is the right of every one to see that his property is well managed and to have access to the proper sources of knowledge in this respect."

This case was cited with approval in *State ex rel. Burke v. Citizens' Bank of Jennings*, 51 La. Ann. 426, and *In Matter of Tuttle v. Iron National Bank*, 170 N. Y. 9, 12. In the latter case it was said: "The principle upon which a stockholder is allowed access to the books of a corporation is as applicable to the case of a banking corporation as it is to any other kind of corporation."

In *State of Missouri ex rel. Doyle v. Laughlin*, 53 Mo. App. 542, a stockholder in an incorporated bank had been denied by the directors the right to inspect the books for the purpose of acquainting himself with the conduct of its affairs and to learn how it was managed. The court there held that he was entitled to a writ of mandamus to compel the inspection, and this notwithstanding the bank contended that it occupied such a confidential and trust relation to its customers and depositors that it would be a breach of duty on its part to open up the books to the inspection of the relator. The authorities are fully examined, and the right of the shareholders to inspect the books for proper purposes and at proper times is recognized in *In re Steinway*, 159 N. Y. 251; *Comm. ex rel. Sellers v. Phoenix Iron Co.*, 105 Pa. St. 111. To the same effect are *Deaderick v. Wilson*, 67 Tenn. 108, 137; *Lewis v. Brainerd*, 53 Vermont, 519, and *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 398. In the latter case it was said:—

"Stockholders are entitled to inspect the books of the company for proper purposes at proper times. . . . And they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders."

The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders, who are the real owners of the property. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 201.

It is suggested in argument that if the shareholder has this right it may be abused, in that he may make an improper use of the knowledge thus gained. There is nothing in this record, however, to suggest, by way of argument or testimony, that the shareholder desired the information which the books would give for other than a lawful purpose. On the other hand, there is a distinct finding that the inspection was desired for the purpose of ascertaining the true financial condition of the bank and for the purpose of enabling the complainant to find out the value of his stock, and whether its business was being conducted according to law. There is no suggestion that the complainant was acting in bad faith or from improper motives, or that he was seeking in any way to misuse the information which the books would afford him. We need not hold that there may not be circumstances which would justify the courts in withholding relief to a stockholder seeking an examination of the books and accounts of the bank. In the case before us no reason is shown for denying to the stockholder the right to know how his agents are conducting the affairs of a concern of which he is part owner. Many legal rights may be the subjects of abuse, but cannot be denied for that reason. A director, who has the right to an examination of the books, may abuse the confidence reposed in him. Certainly this possibility will not be held to justify a denial of legal right, if such right exists in the shareholder. The possibility of the abuse of a legal right affords no ground for its denial. *State ex rel. Doyle v. Laughlin*, 53 Mo. App. *supra*; *People v. Goldstein*, 37 App. Div. N. Y. 550. The text-books are to the same effect as the decided cases. Cook on Stock and Stockholders, sec. 511; Boone on Law of Banking, sec. 235; Angel & Ames on Corporations, 607.

It does not follow that the courts will compel the inspection of the bank's books under all circumstances. In issuing the writ of manda-

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 mus the court will exercise a sound discretion and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes or to gratify idle curiosity or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes. *In re Steinway*, 159 N. Y. 250; *Thompson on Corporations*, § 4412 *et seq.*

We are unable to find in section 5211, requiring reports to be made to the Comptroller of the Currency, or in section 5240, providing for the appointment of examiners to investigate the condition of national banks, anything which cuts down the usual common law right in shareholders in such corporations.

In section 5210 it is provided that a list of shareholders shall be kept, subject to inspection by the shareholders and creditors of the corporation and the officers authorized to assess taxes under state authority. The purpose of this section seems obvious in view of the other provisions of the statute, authorizing taxation by the State, upon the shareholder (section 5219), and providing for the individual liability of the shareholder to an amount equal to his stock in cases of insolvency (section 5151).

This court has said that one, if not the principal, object of this section was to require information as to the shareholders upon whom may rest individual liability for contracts, debts, or other engagements of the bank. *Pauly v. State Loan and Trust Co.*, 165 U. S. 606, 608-621.

It is true that for some purposes a national bank is a public institution, notwithstanding it is the subject of private ownership. It may issue bills, which circulate as part of the currency of the country. It is subject to examination, and in a large measure to the supervision of the Comptroller of the Currency. It is examined at stated periods, and may be the subject of special examination by order of the Comptroller. But it is owned by shareholders, like other banking institutions. It is subject by statute to be sued in the courts of the State. 25 Stat. 433. There is nothing in the banking act, as we read it, which limits a shareholder or shareholders, seeking knowledge for a lawful purpose of an institution in which they have a proprietary interest, to an application to the Comptroller for an examination by a public officer of the affairs of their company. A director need only own ten shares of the stock. Rev. Stat. § 5146. The directors together need not necessarily own the controlling interest in the bank. Yet it is contended they, or the officers of their choice, may deny stockholders the privilege of inspecting for legitimate purposes the property which belongs to them.

But, it is said, the right of the shareholder to inspect the books is cut off by section 5241, providing "no association shall be subject to any visitorial powers other than such as are authorized by this Title, or are vested in the courts of justice." We are unable to find any defi-

nition of "visitorial powers" which can be held to include the common law right of the shareholder to inspect the books of the corporation. "Visitation" is defined by Bouvier (Dic. vol. ii, p. 1199) as follows:—

"The act of examining into the affairs of a corporation.

"The power of visitation is applicable only to the ecclesiastical and eleemosynary corporations. 1 Black. Com. 480. The visitation of civil corporations is by the Government itself, through the medium of the courts of justice. See 2 Kent, 240. In the United States, the legislature is the visitor of all corporations founded by it for public purposes. 4 Wheat. 518."

The origin and nature of "visitorial" power received full discussion in the case cited by Bouvier from 4 Wheaton. See opinion of Mr. Justice Story in *Dartmouth College case*, 4 Wheat. 673.

The meaning of this section was before Judge Baxter in the case of *First Nat. Bank of Youngstown v. Hughes*, 6 Fed. Rep. 737, and of the meaning of the term "visitorial powers," as used in section 5241, that learned judge said:—

"Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. Burrill defines the word to mean 'inspection; superintendence; direction; regulation.'"

At common law the right of visitation was exercised by the king as to civil corporations and as to eleemosynary ones by the founder or donor. 1 Cooley's Blackstone, 481. "In the United States the legislature is the visitor of all corporations created by it, where there is no individual founder or donor, and may direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause forfeiture of their charters." 1 Cooley's Blackstone, 482, note.

In the case before us the Supreme Court of Utah quotes from Merrill on Mandamus as follows:—

"Visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings. In America there are very few corporations which have private visitors, and in the absence of such, the State is the visitor of all corporations."

In no case or authority that we have been able to find has there been a definition of this right, which would include the private right of the shareholder to have an examination of the business in which he is interested, and the right of discovery of the methods and means by which the agents of the corporation are conducting its affairs. The right of visitation being a public right, existing in the State for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind in passing this section that in other sections of the law it had made full

and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and, authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

That the statute did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice to enforce such recognized rights as are here involved, is evident from the language used. If the right to compel the inspection of books was a well-recognized common law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class "vested in courts of justice" which are expressly excepted from the inhibition of the statute.

Finding nothing in the act of Congress limiting the common law right of the shareholder, we think that, under the circumstances of this case, he was wrongfully denied an inspection of the books and accounts of the bank by its officers, and the judgment of the Supreme Court of Utah is

*Affirmed.*

135/624.

Const Cal XII / 4. CCC 377.878. <sup>585 589-90</sup> Penalty for refusal Pen C. 565

C.C.P. 449.1000, 1938, 1985.

Why doesn't exist 467

Limits on C.L. right 465, 7, 8.

Method of enforcement.

Effect of declaration on stockholders - makes stockholders' can sue in respect of right  
Can it be revoked. 472 277  
When is it declared. per ea - cf. 93 N. B. 19; 85 R. 522. 473

FORD v. EASTHAMPTON RUBBER THREAD CO.

471

(B) To recover a Declared Dividend and to compel the Declaration of a Dividend.

CCC 809  
Pen C 560

FORD v. EASTHAMPTON RUBBER THREAD CO. 9593

1893. 158 Mass. 84.

CONTRACT for money had and received. At the trial in the Superior Court, without a jury, before Aldrich, J., there was evidence tending to show that the plaintiff on June 16, 1891, owned fifty-two shares of the capital stock of the defendant company, of the par value of one hundred dollars per share; that on that day the directors passed the following vote, namely, "That a dividend of 20 per cent be paid to stockholders of this date, payable Tuesday, June 23d, 1891"; that on said June 16th the annual meeting of stockholders of the company for the election of directors was held immediately after the meeting of directors, according to custom, and duly elected five directors, as provided by the by-laws of the company, two only of the old directors being re-elected, and no director being re-elected who voted for the twenty per cent dividend, though the two who were re-elected were present at the meeting when it was voted; and that on said June 16th, as soon as the stockholders' meeting adjourned, the directors elected and re-elected thereat met, qualified, organized for the year, and passed the following votes: "That the vote passed by the directors of this company this day declaring a dividend of 20 per cent on the capital stock of the company, payable Tuesday, June 23d, 1891, be reconsidered and rescinded; the same is hereby rescinded. That a dividend of six per cent, payable June 23d instant to stockholders of record this day, be declared in place of the dividend voted at earlier meeting of this board this day." It also appeared that no money was set aside or provided to pay said dividend of twenty per cent, but the company had ample means and facilities for paying the twenty per cent dividend; that always before money had been provided to pay a dividend before it was declared; that money to pay said six per cent dividend was provided after the meeting and before said 23d of June by borrowing, and the same was set aside and deposited in bank therefor; that the treasurer sent the check of the defendant on the bank where the money was deposited to each stockholder of record of said June 16th to pay the dividend on his stock at six per cent, including the plaintiff, on said 23d June, 1891; and that the plaintiff declined to accept the check, and returned the money to the treasurer. It further appeared in evidence that no stockholder of the defendant had been paid the twenty per cent dividend for June, 1891; that a majority of the stockholders had accepted the dividend of six per cent paid by checks as aforesaid on June 23, 1891, in full; that the plaintiff, by his attorney, by letter of June 30, 1891, demanded payment of the twenty per cent dividend from the defendant; and that the plaintiff made no objection to the check of the defendant sent him to pay the dividend of June 16.

Dec  
Vote to pay 20%  
div. & with later

Same day  
new directors  
& rescinded

Pays 7%

No \$ had been  
set aside & 1st  
vote -



1891, except that it was for a dividend of six per cent, instead of twenty per cent.

The defendant asked the court to rule that the directors elected on June 16 had a right on that day to rescind the vote whereby the twenty per cent dividend was declared payable at a future day; and that the plaintiff could not recover. The judge declined so to rule, ordered judgment for the plaintiff, and reported the case for the determination of this court. If the refusal to rule and order of judgment were correct, judgment was to be affirmed; otherwise, judgment was to be ordered for the defendant.

G. M. Stearns, for the plaintiff.

W. G. Bassett, for the defendant.

FIELD, C. J. It seems to be settled that, when a dividend has been fully declared, the corporation thereby manifests its intention that the amount of the dividend should be considered as having been separated from the other property of the corporation, and as having become the individual property of the stockholders, and that therefore, when the dividend becomes payable according to the terms of the vote declaring it, each stockholder has a right to demand payment of the proportional part of the dividend which belongs to his shares of stock, and to sue the corporation for it, if it is not paid on demand. In some cases money or other property equal to the whole amount of the dividend declared has been specifically set apart as a fund appropriated to the payment of the dividend, and the stockholders have been regarded as the *cestuis que trust* of this fund, each entitled to his share. In other cases, the corporation has credited the stockholders with the amount of their shares of the dividend, and the stockholders have assented to this, and the amount so credited has been regarded as a debt of the corporation to the stockholders; or the corporation has paid to some of the stockholders their shares of the dividend, and has refused to pay anything to the others, and it has been held that the corporation must pay all alike. See *Beers v. Bridgeport Spring Co.* 42 Conn. 17; *State v. Baltimore & Ohio Railroad*, 6 Gill, 363; *King v. Paterson & Hudson River Railroad*, 5 Dutch. 504; *Jermain v. Lake Shore & Michigan Southern Railway*, 91 N. Y. 483; *Hopper v. Sage*, 112 N. Y. 530; *Jackson v. Newark Plankroad Co.* 2 Vroom, 277; *Wheeler v. Northwestern Sleigh Co.* 39 Fed. Rep. 347. When a dividend has been declared payable at a definite future time, but no fund has been set apart for the payment of the dividend, and the corporation meanwhile becomes insolvent, whether the stockholders to the extent of their proportions of the dividend should share ratably with the creditors of the corporation in its property has not, so far as we know, been recently considered, but the decision in *Lowene v. American Ins. Co.* 6 Paige, 482, is that they should. The setting apart of a fund to pay a dividend has been held to give a lien upon it to the stockholders, which they can enforce to the exclusion of the general creditors of the corporation. *In re Le Blanc*, 14 Hun, 8, and 75 N. Y. 598. *Le Roy*

When dividend is declared  
pay cash  
has a right

share pro rata  
or other Crs

Specific fund  
set aside - trust  
for stockholders

*v. Globe Ins. Co.* 2 Edw. Ch. 657. The English Companies' Act, 1862, (25 & 26 Vict. c. 89, § 38, cl. 7,) provides that "no sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves." Upon these questions, however, we desire to express no opinion.

It has been argued that there is no consideration for the promise of a corporation to pay a dividend to its stockholders, but we think that the doctrine of consideration applicable to a simple contract between persons having no fiduciary relations to each other is not applicable to such promise. It is the object of a private business corporation to make money for its stockholders, and, under our laws, it is ordinarily the duty of the directors from time to time to declare dividends out of the net earnings, if there are any, and it must be left largely to the discretion of the directors to determine when and for how much such dividends should be declared. The whole property of the corporation is held on a sort of trust for the stockholders, and the directors are, in a general sense, the managers; and when a dividend is declared by the directors, the declaration is a determination by a body authorized to make it that the amount of the dividend should be taken from the property of the corporation and paid over to the stockholders. The cause of action of each stockholder against the corporation for non-payment of the dividend does not arise from any actual contract between the corporation and its stockholders, but from the nature of the organization, and the relation of the stockholders to the corporation and its property. Unless the rights of creditors intervene, or the corporation is enjoined from paying the dividend, on the ground that the dividend has not been earned, or on some other ground, the amount of the dividend, after it has been declared and has become payable, is considered as property held by the corporation for the use of the stockholders individually, and the stockholders may recover their shares as money or property had and received to their use. We have been able to find little or no authority on the precise question involved in this case, namely, whether, after a dividend has been duly declared by a vote of the directors, but payable at a future time, the vote can be rescinded at a subsequent meeting of the directors, held before the time at which the dividend becomes payable according to the vote, when the fact that a dividend has been declared has not been made public, or in any manner communicated to the stockholders, and when no fund has been set apart for the payment of the dividend. On principle, we do not see why the directors may not rescind such a vote, under the circumstances stated. By the vote no specific property passed to the stockholders. If the vote be regarded as a declaration of trust in favor of

*she it arises not - C. but - rel? - shh - B. J.*

*31 Aug 27*

*Exact qn*

*Answer*

the stockholders, it could be revoked before it was communicated to them or any property was identified and set aside for them. Indeed, cases may easily be supposed of such a change in the affairs of a corporation, between the time when a dividend is declared and the time when it becomes payable, as to make the exercise of such a power by the directors useful, if not necessary, for the successful continuance of the business of the corporation. It appears in the present case that the meeting of the new directors at which the vote was rescinded was held after the annual meeting of the stockholders, but on the same day as the meeting of the directors at which the vote was passed, which was held just before the meeting of the stockholders; and that at the meeting of the stockholders "the president did not, as had for many years been the custom, announce that any dividend had been declared, or promulgate the same to the stockholders"; and it does not appear that any of the stockholders, except the directors, knew of the original vote, or that any of the stockholders had made any contracts, incurred any liability, or done anything relying on the vote. It also appears that no fund was distinctly set apart for the payment of the dividend before the vote was rescinded. As the passage of the vote did not constitute an actual contract of the corporation with its stockholders, but was merely a mode of dividing the earnings of the property of the corporation among the stockholders, we are of opinion that before the division had been actually made, and before the position of the stockholders had been changed in reliance on the vote, — certainly before the passage of the vote had been made public, or communicated to the stockholders, — it was within the power of the directors, at a meeting subsequent to that at which the vote was passed, to rescind it. In this action at law, we cannot supervise the exercise of this power by the directors.

*Judgment for the defendant.*

*It is held that to div. Profits the earned belong to Co.*

McNAB v. McNAB & HARLIN MANUF. CO., ET AL.  
*It is with hold a div.*

1891. 69 *New York Supreme Court* (62 *Hun.*), 18.<sup>1</sup>

NEW YORK Supreme Court, General Term, First Department.  
Appeal from Special Term, New York County.

Action brought to compel the division of a surplus among the shareholders. A judgment was rendered, dismissing plaintiff's complaint. Plaintiff appealed.

*Artemus V. Smith*, for appellant.

*Frederic R. Coudert* and *Frederic G. Dow*, for respondents.

DANIELS, J. The McNab & Harlin Company, defendant, was incorporated on or about the 28th of April, 1871, under the laws of this

<sup>1</sup> Only so much of the case is given as relates to one point. — Ed

state providing for the incorporation of manufacturing companies. Its business was declared to be that of manufacturing brass and iron goods for sale, and since its incorporation it has carried on that business. The plaintiff was the owner of 8 shares of its capital stock, which consisted of 150 shares, of \$1,000 each, and the other defendants were officers and shareholders in the company. After its formation, and in or about the year 1877, the company became unable to pay its debts, and a proceeding in bankruptcy was instituted to discharge it from its debts. Soon after the proceeding was commenced the defendant Harlin became the president of the company. He owned seventy-eight shares of its capital stock, and compromised the debts owing to the creditors of the company. The agreement for the compromise was to pay seventy-five per cent. within the period of three years. After he took charge of the affairs of the company as its president, and under his management, the business became prosperous, and the seventy-five per cent. was paid to the creditors, and afterwards they were paid the additional sum of twenty-five per cent., making payment of their demands in full. The prosperity of the company continued, owing to the judicious management of the president, and for eight years prior to the time of the trial, which took place in May, 1891, its net profits amounted to the sum of \$100,000 a year, or a sum slightly in advance of that amount, and from the year 1881 to the year 1891 it made and paid a dividend on its shares amounting to an average exceeding the sum of twenty-five per cent.; and, in addition to the dividends made in this manner, it accumulated a large surplus, which was mainly used in its business, but to the extent of about one hundred thousand dollars was in its deposit accounts. And it was stated by the treasurer in his evidence upon the trial that there was at that time an actual surplus owned by the company amounting to the sum of \$152,209, and the plaintiff, whose action was brought to secure the distribution of the surplus by way of dividends, alleged and claimed that a still larger surplus had been earned and was owned by the company; and it was one of the principal objects of the action to secure the division of this surplus by way of dividends among the shareholders. But it was proved in the course of the trial that the surplus maintained by the company was profitably employed in purchasing the material used by it in the course of its manufactures, and that it was considered for the best interests of the company not to divide this surplus among the shareholders. The directors, in restricting the dividends as they did, seem to have been impressed with the propriety of this conviction, and the dividends were accordingly limited to such amounts from year to year as did not intrench upon the large surplus which had been earned and secured. In their action upon this subject the trustees appear to have exercised the judgment which they deemed to be most consistent with the prosperity and maintenance of the interests of the company, and the statute under which the incorporation took place delegated the authority of the trustees to manage the stock, property, and concerns

*1. surplus  
2. action to compel  
distribution*

*trustees did  
exercise it.*

of the company (2 Rev. St., 5th Ed., p. 503, § 29;) and to what amount the dividends shall be made, and the extent of the surplus which the interests of the company may require to be retained, are within this delegation of authority confided to the trustees. And it was so regarded in *Williams v. Telegraph Co.*, 93 N. Y. 162, where it was said, with the apparent approval of the court, that "when a corporation has a surplus, whether a dividend shall be made, and, if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts." Id. 192. And no broader principle than this was either stated or sanctioned in *Scott v. Fire Co.*, 7 Paige, 198, or in either of the other authorities which have been brought to the attention of the court. The principle to be applied is that which shall secure the observance of good faith on the part of the directors, and this principle was neither denied nor intrenched upon in *Seeley v. Bank*, 8 Daly, 400, which was affirmed in 78 N. Y. 608. The trustees are chosen by the shareholders, to exercise their best judgment, depending upon their knowledge of the affairs and condition of the company; and when that has been done, the courts do not undertake to control their action, although they might differ in their views of the proper management to be adopted and followed. No reason has been disclosed by the case for doubting or impeaching the good faith of these trustees. Neither can it be affirmed justly, in view of the large business carried on by the company, that they acted unreasonably or capriciously in declining to order a larger dividend than that which was in fact paid to the shareholders.

[Opinion on other points omitted.]

41/393 acc. Judgment affirmed.<sup>1</sup>

<sup>1</sup> In *Crichton v. Webb Press Co.*, 113 La. 167, the court compelled the declaration of a dividend, at the instance of minority shareholders, saying, p. 183: Proceeding to adjudicate upon the disputed points, the court finds that a dividend should have been declared and should now be ordered. The company began business with a capital of \$25,000, to which was added the notes of the stockholders to the amount of \$5000. Its profits, according to the report of the experts, amounted in November, 1902, to \$294,683.55. While the business of the company has increased very largely, and the actual cash in bank is very low, yet the court thinks a dividend of \$50,000 could be safely declared, and the court will so order. - 79 Atl. 583

72/199. 90/131

The right of pre-emption is often conferred by Stat in Co's chart. n 42. It is said to connect to, exist indep. Stat.

Value, at to sub. - preserve proport. cut in prop. manag. corp

Tolent. at - price at wh they may subscribe. 482 x 9/100 = 43.38

STOKES v. CONTINENTAL TRUST CO.

477

Objectors to other than sale at par. 480 x - squeeze out 481 x

Limits - new stock - why re issued old stock does not affect? 48 v 266

(c) To subscribe to New Issues of Stock. 159.

issued for \$ - not prop. of peculiar out 55 2/3 211, 184 Pa 102.

Nature, Rt. option - no corollary duty to take

127 STOKES v. CONTINENTAL TRUST CO.

158 2/3 159

208 2/3 298

1906. 186 New York, 285.

18 YL Jour.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 4, 1905, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

This action was brought by a stockholder to compel his corporation to issue to him at par such a proportion of an increase made in its capital stock as the number of shares held by him before such increase bore to the number of all the shares originally issued, and in case such additional shares could not be delivered to him for his damages in the premises.

The defendant is a domestic banking corporation in the city of New York, organized in 1890, with a capital stock of \$500,000, consisting of 5000 shares of the par value of \$100 each. The plaintiff was one of the original stockholders, and still owns all the stock issued to him at the date of organization, together with enough more acquired since to make 221 shares in all. On the 29th of January, 1902, the defendant had a surplus of \$1,048,450.94, which made the book value of the stock at that time \$309.69 per share. On the 2d of January, 1902, Blair & Company, a strong and influential firm of private bankers in the city of New York, made the following proposition to the defendant: "If your stockholders at the special meeting to be called for January 29, 1902, vote to increase your capital stock from \$500,000 to \$1,000,000 you may deliver the additional stock to us as soon as issued at \$450 per share (\$100 par value) for ourselves and our associates, it being understood that we may nominate ten of the twenty-one trustees to be elected at the adjourned annual meeting of stockholders."

The directors of the defendant promptly met and duly authorized a special meeting of the stockholders to be called to meet on January 29, 1902, for the purpose of voting upon the proposed increase of stock and the acceptance of the offer to purchase the same. Upon due notice a meeting of the stockholders was held accordingly, more than a majority attending either in person or by proxy. A resolution to increase the stock was adopted by the vote of 4197 shares, all that were cast. Thereupon the plaintiff demanded from the defendant the right to subscribe for 221 shares of the new stock at par, and offered to pay immediately for the same, which demand was refused. A resolution directing a sale to Blair & Company at \$450 a share was then adopted by a vote of 3596 shares to 241. The plaintiff voted for the first resolution but against the last, and before the adoption of the latter he protested against the proposed sale of his proportionate share of the

stock and again demanded the right to subscribe and pay for the same, but the demand was refused.

On the 30th of January, 1902, the stock was increased, and on the same day was sold to Blair & Company at the price named. Although the plaintiff formally renewed his demand for 221 shares of the new stock at par and tendered payment therefor, it was refused upon the ground that the stock had already been issued to Blair & Company. Owing in part to the offer of Blair & Company, which had become known to the public, the market price of the stock had increased from \$450 a share in September, 1901, to \$550 in January, 1902, and at the time of the trial, in April, 1904, it was worth \$700 per share.

Prior to the special meeting of the stockholders, by authority of the board of directors a circular letter was sent to each stockholder, including the plaintiff, giving notice of the proposition made by Blair & Company and recommending that it be accepted. Thereupon the plaintiff notified the defendant that he wished to subscribe for his proportionate share of the new stock, if issued, and at no time did he waive his right to subscribe for the same. Before the special meeting, he had not been definitely notified by the defendant that he could not receive his proportionate part of the increase, but was informed that his proposition would "be taken under consideration."

After finding these facts in substance, the trial court found, as conclusions of law, that the plaintiff had the right to subscribe for such proportion of the increase, as his holdings bore to all the stock before the increase was made; that the stockholders, directors, and officers of the defendant had no power to deprive him of that right, and that he was entitled to recover the difference between the market value of 221 shares on the 30th of January, 1902, and the par value thereof, or the sum of \$99,450, together with interest from said date. The judgment entered accordingly was reversed by the Appellate Division, and the plaintiff appealed to this court, giving the usual stipulation for judgment absolute in case the order of reversal should be affirmed.

VANN, J. . . . The leading authority is *Gray v. Portland Bank*, decided in 1807 and reported in 3 Mass. 364. In that case a verdict was found for the plaintiff, subject, by the agreement of the parties, to the opinion of the court upon the evidence in the case whether the plaintiff was entitled to recover, and, if so, as to the measure of damages. The court held that stockholders who held old stock had a right to subscribe for and take new stock in proportion to their respective shares. As the corporation refused this right to the plaintiff he was permitted to recover the excess of the market value above the par value, with interest. In the course of its argument the court said: "A share in the stock or trust when only the least sum has been paid in is a share in the power of increasing it when the trustee determines or rather when the *cestuis que trustent* agree upon employing a greater sum. . . . A vote to increase the capital stock, if it was not the creation of a new and disjointed capital, was in its nature an agreement

among the stockholders to enlarge their shares in the amount or in the number to the extent required to effect that increase. . . . If from the progress of the institution and the expense incurred in it any advance upon the additional shares might be obtained in the market, this advance upon the shares relinquished belonged to the whole, and was not to be disposed of at the will of a majority of the stockholders to the partial benefit of some and exclusion of others."

This decision has stood unquestioned for nearly a hundred years, and has been followed generally by courts of the highest standing. It is the foundation of the rule upon the subject that prevails, almost without exception, throughout the entire country.

[After reviewing the authorities.] If the right claimed by the plaintiff was a right of property belonging to him as a stockholder he could not be deprived of it by the joint action of the other stockholders and of all the directors and officers of the corporation.

What is the nature of the right acquired by a stockholder through the ownership of shares of stock? What rights can he assert against the will of a majority of the stockholders and all the officers and directors? While he does not own and cannot dispose of any specific property of the corporation, yet he and his associates own the corporation itself, its charter, franchises, and all rights conferred thereby, including the right to increase the stock. He has an inherent right to his proportionate share of any dividend declared, or of any surplus arising upon dissolution, and he can prevent waste or misappropriation of the property of the corporation by those in control. Finally, he has the right to vote for directors and upon all propositions subject by law to the control of the stockholders, and this is his supreme right and main protection. Stockholders have no direct voice in transacting the corporate business, but through their right to vote they can select those to whom the law intrusts the power of management and control. *on what are stock rights.*

A corporation is somewhat like a partnership, if one were possible, conducted wholly by agents where the copartners have power to appoint the agents, but are not responsible for their acts. The power to manage its affairs resides in the directors, who are its agents, but the power to elect directors resides in the stockholders. This right to vote for directors and upon propositions to increase the stock or mortgage the assets, is about all the power the stockholder has. So long as the management is honest, within the corporate powers and involves no waste, the stockholders cannot interfere, even if the administration is feeble and unsatisfactory, but must correct such evils through their power to elect other directors. Hence the power of the individual stockholder to vote in proportion to the number of his shares is vital, and cannot be cut off or curtailed by the action of all the other stockholders even with the cooperation of the directors and officers. *At stake is vital & = nt to :: vote: e. to vote power rep'dy this :: stock extend*

In the case before us the new stock came into existence through the exercise of a right belonging wholly to the stockholders. As the right



Holder shd. must be for stock at par. 108 Va 546; 138 Mich 79.  
The N.Y. rule preserves pecuniary value for his prop is increased by amt paid  
for stock by one who outbids him - but on abt. vol. power.

to increase the stock belonged to them, the stock when increased belonged to them also, as it was issued for money and not for property or for some purpose other than the sale thereof for money. By the increase of stock the voting power of the plaintiff was reduced one half, and while he consented to the increase he did not consent to the disposition of the new stock by a sale thereof to Blair & Company at less than its market value, nor by sale to any person in any way except by an allotment to the stockholders. The increase and sale involved the transfer of rights belonging to the stockholders as part of their investment. The issue of new stock and the sale thereof to Blair & Company was not only a transfer to them of one half the voting power of the old stockholders, but also of an equitable right to one half the surplus which belonged to them. In other words, it was a partial division of the property of the old stockholders. The right to increase stock is not an asset of the corporation any more than the original stock when it was issued pursuant to subscription. The ownership of stock is in the nature of an inherent but indirect power to control the corporation. The stock when issued ready for delivery does not belong to the corporation in the way that it holds its real and personal property, with power to sell the same, but is held by it, with no power of alienation, in trust for the stockholders, who are the beneficial owners and become the legal owners upon paying therefor. The corporation has no rights hostile to those of the stockholders, but is the trustee for all including the minority. The new stock issued by the defendant under the permission of the statute did not belong to it, but was held by it the same as the original stock when first issued was held in trust for the stockholders. It has the same voting power as the old, share for share. The stockholders decided to enlarge their holdings, not by increasing the amount of each share, but by increasing the number of shares. The new stock belonged to the stockholders as an inherent right by virtue of their being stockholders, to be shared in proportion upon paying its par value or the value per share fixed by vote of a majority of the stockholders, or ascertained by a sale at public auction. While the corporation could not compel the plaintiff to take new shares at any price, since they were issued for money and not for property, it could not lawfully dispose of those shares without giving him a chance to get his proportion at the same price that outsiders got theirs. He had an inchoate right to one share of the new stock for each share owned by him of the old stock, provided he was ready to pay the price fixed by the stockholders. If so situated that he could not take it himself, he was entitled to sell the right to one who could, as is frequently done. Even this gives an advantage to capital, but capital necessarily has some advantage. Of course, there is a distinction when the new stock is issued in payment for property, but that is not this case. The stock in question was issued to be sold for money, and was sold for money only. A majority of the stockholders, as part of their power to increase the stock, may attach rea-

They set the price since they can decide on issue

222 491\*

But per rule holders & corp in the easiest & direct way of developing bus  
satisfy its needs by getting > \$ for least part > shares & sub: appar of  
course more sh: must be sold also if corp has nearly reached its legal limit the  
par rule compels it to declare a div: diff: 2: mkt & new stock & par for  
sh: unable to subscribe & can sell them at 60 to 67 7/8 234 - 29 Co's shares

STOKES v. CONTINENTAL TRUST CO.

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sonable conditions to the disposition thereof, such as the requirement  
that every old stockholder electing to take new stock shall pay a fixed  
price therefor, not less than par, however, owing to the limitation of  
the statute. They may also provide for a sale in parcels or bulk at  
public auction, when every stockholder can bid the same as strangers.  
They cannot, however, dispose of it to strangers against the protest of  
any stockholder who insists that he has a right to his proportion.  
Otherwise the majority could deprive the minority of their proportion-  
ate power in the election of directors and of their proportionate right  
to share in the surplus, each of which is an inherent, preemptive, and  
vested right of property. It is inviolable and can neither be taken  
away nor lessened without consent, or a waiver implying consent.  
The plaintiff had power, before the increase of stock, to vote on 221  
shares of stock, out of a total of 5000, at any meeting held by the  
stockholders for any purpose. By the action of the majority, taken  
against his will and protest, he now has only one half the voting power  
that he had before, because the number of shares has been doubled  
while he still owns but 221. This touches him as a stockholder in  
such a way as to deprive him of a right of property. Blair & Com-  
pany acquired virtual control, while he and the other stockholders lost  
it. We are not discussing equities, but legal rights, for this is an  
action at law, and the plaintiff was deprived of a strictly legal right.  
If the result gives him an advantage over other stockholders, it is be-  
cause he stood upon his legal rights, while they did not. The question  
is what were his legal rights, not what his profit may be under the sale  
to Blair & Company, but what it might have been if the new stock had  
been issued to him in proportion to his holding of the old. The other  
stockholders could give their property to Blair & Company, but they  
could not give his.

A share of stock is a share in the power to increase the stock, and  
belongs to the stockholders the same as the stock itself. When that  
power is exercised, the new stock belongs to the old stockholders in  
proportion to their holding of old stock, subject to compliance with  
the lawful terms upon which it is issued. When the new stock is  
issued in payment for property purchased by the corporation, the  
stockholders' right is merged in the purchase, and they have an ad-  
vantage in the increase of the property of the corporation in proportion  
to the increase of stock. When the new stock is issued for money,  
while the stockholders may provide that it be sold at auction or fix  
the price at which it is to be sold, each stockholder is entitled to his  
proportion of the proceeds of the sale at auction, after he has had a  
right to bid at the sale, or to his proportion of the new stock at the  
price fixed by the stockholders.

We are thus led to lay down the rule that a stockholder has an in-  
herent right to a proportionate share of new stock issued for money  
only and not to purchase property for the purposes of the corporation  
or to effect a consolidation; and while he can waive that right, he can-

are sold at 120  
but these can  
be had at 100  
x So Co goes  
away 200  
to cash.

of a total  
at 100  
act: 100

destructive 2  
stock issued for  
\$ and stock  
issued for prop

- Don't \$ prop. Co

?

not be deprived of it without his consent except when the stock is issued at a fixed price not less than par and he is given the right to take at that price in proportion to his holding, or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources. This rule is just to all and tends to prevent the tyranny of majorities which needs restraint, as well as virtual attempts to blackmail by small minorities which should be prevented.

The remaining question is whether the plaintiff waived his rights by failing to do what he ought to have done, or by doing something he ought not to have done. He demanded his share of the new stock at par, instead of at the price fixed by the stockholders, for the authorization to sell at \$450 a share was virtually fixing the price of the stock. He did more than this, however, for he not only voted against the proposition to sell to Blair & Company at \$450, but as the court expressly found, he "protested against the proposed sale of his proportionate share of the stock and again demanded the right to subscribe and pay for the same, which demands were again refused," and "the resolution was carried notwithstanding such protest and demands." Thus he protested against the sale of his share before the price was fixed, for the same resolution fixed the price and directed the sale, which was promptly carried into effect. If he had not attended the meeting, called upon due notice to do precisely what was done, perhaps he would have waived his rights; but he attended the meeting, and before the price was fixed demanded the right to subscribe for 221 shares at par and offered to pay for the same immediately. It is true that after the price was fixed he did not offer to take his share at that price, but he did not acquiesce in the sale of his proportion to Blair & Company, and unless he acquiesced the sale as to him was without right. He was under no obligation to put the corporation in default by making a demand. The ordinary doctrine of demand, tender, and refusal has no application to this case. The plaintiff had made no contract. He had not promised to do anything. No duty of performance rested upon him. He had an absolute right to the new stock in proportion to his holding of the old, and he gave notice that he wanted it. It was his property, and could not be disposed of without his consent. He did not consent. He protested in due time, and the sale was made in defiance of his protest. While in connection with his protest he demanded the right to subscribe at par, that demand was entirely proper when made, because the price had not then been fixed. After the price was fixed it was the duty of the defendant to offer him his proportion at that price, for it had notice that he had not acquiesced in the proposed sale of his share, but wanted it himself. The directors were under the legal obligation to give him an opportunity to purchase at the price fixed before they could sell his property to a third party, even with the approval of a large majority of the stockholders. If he had remained silent and had made no re-

quest or protest he would have waived his rights, but after he had given notice that he wanted his part and had protested against the same thereof, the defendant was bound to offer it to him at the price fixed by the stockholders. By selling to strangers without thus offering to sell to him, the defendant wrongfully deprived him of his property and is liable for such damages as he actually sustained.

The learned trial court, however, did not measure the damages according to law. The plaintiff was not entitled to the difference between the par value of the new stock and the market value thereof, for the stockholders had the right to fix the price at which the stock should be sold. They fixed the price at \$450 a share, and for the failure of the defendant to offer the plaintiff his share at that price we hold it liable in damages. His actual loss, therefore, is \$100 per share, or the difference between \$450, the price that he would have been obliged to pay had he been permitted to purchase, and the market value on the day of sale, which was \$550. This conclusion requires a reversal of the judgment rendered by the Appellate Division and a modification of that rendered by the trial court.

The order appealed from should be reversed and the judgment of the trial court modified by reducing the damages from the sum of \$99,450, with interest from January 30, 1902, to the sum of \$22,100, with interest from that date, and by striking out the extra allowance of costs, and as thus modified the judgment of the trial court is affirmed, without costs in this court or in the Appellate Division to either party.<sup>1</sup>

<sup>1</sup> In *Wall v. Utah Copper Co.*, 70 N. J. Eq. 17 (1905), each shareholder was held to have a similar right where bonds, convertible into stock, were to be issued.

2014R398 18 Yale CR101 - D Wright

186263 v. OCHY. 1909 acc

Dwight says that Gray & Porter Bank was a co. in which it was org'd as a Corp. not \$1000 over more than 30,000. Later stockholders voted to issue 20,000 new shares. It was refused at the time for 2<sup>nd</sup> time then shares. It held this was an issue new stock but an addition of bank already commenced. "A vote to > Co. if it was a new creation, a new & disorganized corp. was in its nature an agreement among stockholders to enlarge their share in and or no to extent req'd to effect to increase. The shares at the time were one & first installment & increased capital & could be paid might be reasonably enforced & provided for a forfeiture, delinq. shares to be sold & acct for & stockholders proceeds to be carried to his acct deducting installments on add'l paym't req'd. Hence this co. holds 1<sup>st</sup> in addition of new capital & enlarge, & a stockholder's share is larger. (2) Pay for new stock might be enforced vs a stockholder.

also go to show that a stockholder is entitled if he wishes to make a loan to the company (1<sup>st</sup> & 2<sup>nd</sup>) - clearly not in case of issue of stock's prop.

Q - Who owns new stock - 480 - if stockholders have to pay - can they be made to take it up - why did my firm price.

Practicality to rule - Can 10 share man afford to pay 300 for 10 shares & so for price with all others must come up to to get stock. If then 100 know they had to split with stockholders they have for as much.

Don't seem to have taken into account his share loss, only for new

25th 59: A corporation has a duty to act in its authority to manage corp for its benefit & all concerned. Hence it may enforce these obligations or get redress therefor? But wrong (redress arises sometimes & conduct n. only, corp but, pass. corp, corp & sh. or s. The corp is distinct & sh. is so corp alone caused loss in mgmt & even tho sh. is a d. of same wrong. SMITH v. HURD. It is vs corp to enforce its duty to redress wrong. This remedy is derivative tho he has suffered a real loss. 187 Mass 423

Genl principle.

When corp is injured the corp in its corporate name is only proper party to complain in law.

(D) To compel the Corporation to assert Valid Claims, and to resist Invalid Claims.  
Herein of the Procedure necessary in bringing a Shareholder's Bill.

1847

What limit on rights? Why?

### § SMITH v. HURD ET AL.

1847. 12 Metcalf (Mass.), 371.<sup>1</sup>

Sh. ass. action. THIS was a special action on the case, by a stockholder of the Phoenix Bank against the directors. There were two counts; one vs sh. & nonfeas. founded in non-feasance of official duty, the other in misfeasance.

1. The sh. & bus mgmt. 2. Wrongful duty. 3. Wrongful pay. 4. Div. 5. Cap. 6. False report.

The first count alleged (*inter alia*) that it was the duty of the directors to direct and superintend the proceedings of the officers, and to exercise reasonable vigilance in seeing that the property of the bank was not lost, wasted, or misused; but that the directors disregarding their duty, and contriving together to injure and deceive the plaintiff therein, neglected to give reasonable personal attention to the business of the bank; and negligently permitted the whole business to be managed by the president, Wyman, who loaned its monies on insufficient securities, used certain sums himself, and made loans to individual directors exceeding the limits of the law; whereby the bank capital became wholly lost, and plaintiff was made liable, under the law, for his proportion of the capital lost by the official mismanagement of the directors, and further liable to pay large sums for the redemption of the bills of the bank.

The second count alleged (*inter alia*) that the directors, disregarding their duties, and contriving together to injure and deceive the plaintiff therein, concurred with each other that the whole business should be managed by the president, Wyman, as he should see fit; and that defendants themselves declared dividends when there were no profits, and caused false returns to be made to the State authorities, by which means plaintiff was misled and induced to rely on the security of his investment. And, generally, the second count charged as acts of the defendants (done through Wyman) the matters which, in the first count, were charged as negligences and permissions, and deduced

<sup>1</sup> Statement abridged. Arguments omitted.— Ed.

Of course if this special act alone is peculiarly affected by a bank's corporate obligations, then the business is personal direct. i.e. unincorporated. But, says, declared div. re. Issue here is, is a corp. or indiv. sh. Such a claim indeed can be joined with a bill-multiple damages. 1873 886. In suit for misapprop. of corp. prop. & no div. for fraud in selling shares. 485  
SMITH v. HURD  
of 185/562-740.752-76

therefrom in like manner the failure of the bank, and the special damage to the plaintiff. The court concluded with an averment that defendants, by "misconducting the business of said bank, as aforesaid, so wilfully, deceitfully and fraudulently mismanaged the business and property of the said bank, that the whole capital thereof was utterly lost and wasted."

Defendants demurred to the declaration.

*B. R. Curtis and B. Rand*, for defendants.

*Gardiner (Greenleaf with him)*, for plaintiff.

SHAW, C. J. This is certainly a case of first impression. We are not aware that any similar action has been sustained in England, or in any of the courts of this country. It is founded on no statute. It is an action on the case, at common law, brought by an individual holder of shares in an incorporated bank, against the directors, not including the president, setting forth various acts of negligence and malfeasance, through a series of years, in consequence of which, as the declaration alleges, the whole capital of the bank was wasted and lost, and the shares of the plaintiff became of no value. The circumstance that no such action has been maintained, would certainly be no decisive objection, if it could be shown to be maintainable on principle. But the fact, that similar grievances have existed to a great extent, and in numberless instances, where such an action would have presented an obvious and effective remedy, affords strong proof, that in the view of all such suffering parties, and their legal advisers and guides, there was no principle on which such an action can be maintained. *facts*

If an action can be brought by one stockholder, it may be brought by the holder of a single share; so that for one and the same default of these directors, thirty-five hundred actions might be brought. If it may be sustained by proof of an act, or series of acts, of carelessness, neglect, and breach of duty, in managing the affairs of the bank, by which the whole value of the stock is destroyed, it may, on the same principle, be maintained on any act or instance of such negligence, by which the shares are diminished in value fifty, ten, five, or one per cent. Still, notwithstanding these consequences, if the plaintiff has a good right of action, upon recognized and sound legal principles, his action ought to be sustained. *initially no many such in a medium*

But the court are of opinion that the action cannot be maintained; and that on several grounds, a few of the more prominent of which may be alluded to.

1. There is no legal privity, relation, or immediate connexion, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders. The bank is a corporation and body politic, having a separate existence as a distinct person in law, in whom the whole stock and property of the bank are vested, and to whom all agents, debtors, officers and servants are responsible for all contracts, express *There are reasons for it*

Resolves 2 These live acts - in parties not understood & shd be.  
 1 In A-allegation parties A is necessary in B is irrelevant. 11/24/21 of 10/11/21  
 2 In B all defenses w/ corp are pertinent 12/3/21 546-50. 1483/1019. 88A/0072

or implied, made in reference to such capital, and for all torts and injuries diminishing or impairing it. The very purpose of incorporation is, to create such legal and ideal person in law, distinct from all the persons composing it, in order to avoid the extreme difficulty, and perhaps it is not too much to say the utter impracticability, of such a number of persons acting together in their individual capacities. The practical difficulty would be nearly as great, whether it were held that all must join in an action to recover damage for an injury to the common property, or that each might sue separately.

The stockholders do, indeed, ordinarily elect the directors; but it is as parts and members of the corporation, in their corporate capacity, in modes pointed out by the charter and by-laws, so that the directors are the appointees of the corporation, not of the individuals. Indeed, I believe there is a provision in the bank charters — there certainly was formerly — which is equally to the present purpose; namely, that the Commonwealth shall be at liberty to add a certain amount to the capital of various banks, and appoint a proportional number of directors. Such directors, so appointed, pursuant to the charter regulating the legal organization of the body, would stand in all respects on the footing of directors chosen by the stockholders. If these were liable to the action of individual stockholders, those would be, in like manner.

2. The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined. They are members of an organized body, and exercise such powers as the organization of the institution gives them. Stockholders in banks have a separate right to dividends, when declared, and to a distributive share of the capital stock, if any remains when the charter of the bank is at an end, and its debts paid.

3. But another important consideration is, that the injury done to the capital stock by wasting, impairing, and diminishing its value, is not, in the first instance, nor necessarily, a damage to the stockholders. All sums which could, in any form, be recovered on that ground, would be assets of the corporation, and when collected and received by directors, receivers, or any other persons entitled to receive the same, they would be held in trust, first to redeem the bills and pay the debts of the bank; and it would be only after these debts were paid, and in case any surplus should remain, that the stockholders would be entitled to receive any thing. It is, therefore, an indirect, contingent and sub-

Shd have no  
 control over  
 the corp's  
 legal  
 business  
 p. 10

A donee nd me  
 1 shd directly

2/25/21

Text suggested - 22 H.R. 595 - Re: necessary remedy n. only rights - a stockholder  
corp but also those a stockholder for a corp. bill. s. may be corp. or n. stockholder  
cf 1663 120

ordinate interest, which each stockholder has, in damages so to be recovered against directors. If, upon such indirect, contingent, and remote interest, individual stockholders could recover for the defaults of directors, and especially, as is alleged in this case, where these defaults have been so great as to sink the capital, *a fortiori* would the creditors of the bank individually have a right to maintain similar actions; because their claim upon the funds, being prior to that of stockholders, would be somewhat more immediate and direct.

In the same connexion, it is obvious to remark, that a judgment in favor of one stockholder would be no bar to an action by a creditor, nor a judgment by both, to an action by the corporation.

4. But it is said, that although the real and personal estate, the securities and capital stock, are, in legal contemplation, vested in the corporation, yet the individual has a separate and distinct property and interest in his particular shares, by any injury to which he may have a separate damage. To some extent, it is true that he has a several interest in his shares; but it is to be taken with some qualifications. Strictly speaking, shares in a bank do not constitute a legal estate and property; it is rather a limited and qualified right which the stockholder has to participate, in a certain proportion, in the benefits of a common fund, vested in a corporation for the common use; it is a qualified and equitable interest, a valuable interest, manifested usually by a certificate, which is transferable. To the extent of this separate and peculiar interest, a stockholder, no doubt, might maintain his separate and special action, according to the nature of the wrong done to him in respect to it; as trover or trespass, for the conversion or tortious taking of his certificate; trespass on the case for refusing to make a transfer on a proper occasion; assumpsit for a dividend declared, and the like. But an injury done to the stock and capital, by negligence, or misfeasance, is not an injury to such separate interest, but to the whole body of stockholders in common. It is like the case of a common nuisance, where one who suffers a special damage, peculiar to himself, and distinguishable in kind from that which he shares in the common injury, may maintain a special action. Otherwise, he cannot. Co. Lit. 56 a. 3 Steph. N. P. 2872. *Lansing v. Smith*, 8 Cow. 146.

But we are pressed with the argument, that for every damage which one sustains, which is caused by the wrongful act of another, he ought to have a remedy. This is far from being universally true. Another maxim in regard to claims for damage is, *causa proxima, non remota, spectatur*. Thousands of instances occur, in which one sustains consequential and incidental damage from the misconduct of another, without a remedy at law. By the misconduct of the officers or agents of a parish, town, county, or even of the State or the Union, defalcations may take place, treasure be squandered and wasted, and all the members of the respective aggregate bodies suffer damage, for which the law, from the nature of the case, can afford no direct remedy. But the

These shares are on the stock and are n. legal & but one of int. & then my int. for the stock and

Case in which has an action v. Corp

Nothing thus is - v. inf.

\* "A stockholder is wronged by the corporation may be wronged by the individual stockholders. If so, the stockholder may have an individual action. E.g. for unlawful neglect, the stockholder may sue the corporation. 6 Ch. 376, 381-382. cf 20 Ch. 669

Test: whether individual's separate rights are involved in a wrong. Corp. is accountable to the stockholder (individual complainant) affected only as a shareholder, other stockholder is affected or is he affected in some manner peculiar to him" cf 185 Mass 422, 22; 176 N.Y. 1193; 191 Mass 240



Real remedy is  
the corp | true answer to the objection is, that stockholders have a remedy, a theoretic one indeed, and perhaps often inadequate, in the power of the corporation, in its corporate capacity, to obtain redress for injuries done to the common property, by the recovery of damages; and each individual stockholder has his remedy, through the powers thus vested in the corporation, for the common benefit.

On the whole, the court are of opinion that the demurrer is well taken, and that the action cannot be maintained.

cf. p. 11 - p. 12 has only a right to  $\pi$  after pay. debts, assets after money up  
Corp is a p. 11 & 12 derives its charter

### CHAMBERS v. MCKEE & BROTHERS.

1898. 185 Pennsylvania, 105.

OPINION BY MR. JUSTICE WILLIAMS, March 21, 1898: —

McKee & Brothers is a partnership engaged in the manufacture of glass tableware. The Chambers & McKee Glass Co. is a corporation organized under the act of 1874 and its supplements, for the manufacture of window glass. The manufacturing plants of the partnership and the corporation are in close proximity, and are supplied with natural gas as a fuel from wells owned and operated by the corporation, under an agreement that the expense of furnishing the natural gas shall be shared, as near as may be, in proportion to the amount used at each plant. Mrs. Chambers, the plaintiff, is a large stockholder in the Chambers & McKee Glass Co., but has no interest in the partnership of McKee & Brothers.

Operations were begun in both factories some time in 1889. A difference of opinion arose as to the relative proportions of the expense of the natural gas used and to be paid for by each. This difference was submitted to two competent experts for decision, who were to determine what sum should be paid by McKee & Brothers from the commencement of operations to December 21, 1891. If unable to agree they were empowered to select an umpire and decide by a majority. They entered upon an examination of the subject and submitted a report without selecting an umpire, in which they fixed the amount to be paid by McKee & Brothers at seventeen and seventy-two one hundredths per cent of the entire cost of the natural gas for both plants, and that to be paid by the Chambers & McKee Glass Co. at eighty-two and twenty-eight one hundredths. On December 29, 1891, the report was presented to the board of directors, and on the same day one of the arbitrators communicated to them the fact that his assent to the award had been given under the influence of an important mistake of fact, and that the award was not assented to by

him. The reference to the arbitrators does not seem to have been made a rule of court or to have been drawn under any statute relating to arbitration, but to have been made by the parties with a view to securing the judgment of competent persons upon the quantity of gas used by each, and to relieve Mr. H. Sellers McKee from the very embarrassing position in which he found himself. He was the president and a large stockholder in the corporation. He was also the largest contributor to the capital of the partnership of McKee & Brothers. He was thus the head of the creditor corporation, and he was personally, as a member of his firm, the debtor. Without further meeting of the arbitrators, or other effort to investigate the alleged mistake asserted by one of them, the board of directors of the corporation, H. Sellers McKee being one of them, decided in March, 1892, to settle with McKee Brothers on the basis of the discredited award, and this was accordingly done. Four years afterwards Mrs. Chambers served the notice attached to her bill requiring the directors of the corporation to take steps to compel McKee & Brothers to pay to the corporation the money it owed for natural gas both before and after such settlement, within two weeks after such notice, and stating her intention, if this was not done, to proceed on her own behalf as a stockholder to compel such settlement. This bill was filed pursuant to the notice given by her. It is against the corporation of which she is a stockholder, and the partnership which she alleges to be its debtor, and the relief asked includes the taking of an account of the gas used by McKee & Brothers from the wells and pipe lines of the Chambers & McKee Glass Company, and the payment therefor in the proportion which the amount so used bears to the whole amount consumed by both plants. Is she entitled to have an account taken of the gas consumed by McKee & Brothers? We do not think the award is in her way. We fully agree with the learned judge of the court below that the mistake brought to the attention of the parties by George H. Browne, one of the arbitrators, soon after the award was made, and before any action was taken upon it by either party, was of such a character as to prevent its enforcement at law or in equity. As the learned judge well said, "It was not a mere error in judgment based upon established facts, but an error in reference to the facts themselves upon which his judgment was based, and which he hastened to correct as soon as he became aware of his mistake by notifying defendant company to that effect."

Act. bill in eq.

After this mistake was brought to the attention of the directors, and the fact was made known to them that the relative proportion of gas consumed by McKee & Brothers was, so far at least as Mr. Browne was concerned, fixed under the influence of this mistake at much less than it should have been, it was no longer binding upon them. But corporations are governed and their business is directed by persons chosen by the stockholders for that purpose. Their action legally

taken is the action of the corporation, and as between it and the persons with whom it deals, it is binding. The board of directors of the Chambers & McKee Glass Company, with full notice of the mistake of Browne, and against the protest of one or more of its members, resolved to settle the claim of the corporation they represented on the basis of the award. The amount so fixed was paid by McKee & Brothers, and received by the corporation in full settlement of the demand which had been considered by the arbitrators. If this was done in good faith by the board of directors of the corporation, every stockholder was bound by it, even though it was an error in judgment and resulted in a serious loss to the corporation. If it was not so done, but was collusive and fraudulent, it is not conclusive, but may be investigated, and upon a proper showing held to be a nullity, and an account taken for the purpose of determining the true amount of gas consumed by McKee & Brothers and the actual amount of their indebtedness to the corporation therefor. The real question, therefore, on which the plaintiff's right as a stockholder to an account depends, is the validity of the action of her agents, the board of directors. They have settled this claim. That action binds the stockholder unless it was fraudulently taken. Fraud is not presumed. The natural presumption is in favor of innocence and good faith. The plaintiff has this presumption to overcome both in her bill and by her proofs, and until she presents such a case as will justify a finding that the conduct of the board of directors in making the settlement with McKee & Brothers was fraudulent, and in bad faith toward the corporation represented by them, she has no title to the relief she seeks. It would seem from the evidence before us that the settlement complained of was not an advantageous one to the corporation or its stockholders. It is possible that personal considerations may have influenced the result; but stockholders take the risk of the business qualifications and business judgment of those whom they may select as directors, and as a general rule they cannot be heard to complain if the action of their agents is not the most discreet and the most careful that could have been taken. But when a director betrays his trust and defrauds those whom he ought to serve with fidelity, every stockholder has a right to complain, and it is the duty of the courts to assist in relieving against the consequences of such frauds whenever it is practicable. The learned judge who heard the testimony in this case reached this conclusion from it: "It is true the plaintiff alleges that this was done (the settlement of this claim) in violation and fraud of her rights, but I can find nothing which will justify me in coming to the conclusion that the directors acted in bad faith or knowingly or intentionally disregarded the interests of the stockholders of the company." In the absence of the finding of bad faith on the part of the directors, or an intentional disregard of the interests of the corporation confided to their care, the only ground on which the relief sought

These can only  
have act. in  
investigated

2-2

could be extended was absent, and there was nothing left for the learned judge to do but dismiss the plaintiff's bill without prejudice to her right to proceed in any proper way to relieve herself from the consequences of any fraudulent acts of her agents, the directors of the Chambers & McKee Glass Company, in connection with the settlement of which she complains.

We are not disposed to allow the costs in this case to follow the result of this appeal, but will modify the decree appealed from by imposing one third of the costs in this case upon the plaintiff, one third upon the directors of the Chambers & McKee Glass Co., as individuals, and one third upon McKee & Brothers.

As so modified the decree is affirmed.

*What is injury & relief sought here. if 492  
 To whom is it done & of 497  
 Can such injury be redressed ever at suit. 494  
 Under what cond. 496  
 1. sub. m. 496, 30*

FOSS v. HARBOTTLE.

1843. 2 Hare, 461.<sup>1</sup>

BILL in equity by Foss and Turton, shareholders in a corporation styled the Victoria Park Company, on behalf of themselves and all other shareholders, against five persons who had been directors, and also against several other persons. *Suit by 2 sh in on by 1 p. l. v. & all other sh.*

The case stated in the bill was, in part, as follows :

At or after the formation of the company was agreed upon, an arrangement was fraudulently concerted between certain parties (including a majority of the directors), with the object of enabling themselves to derive a profit or personal benefit from the establishment of the company. The arrangement was, that certain of the parties should be appointed directors, and should purchase for the company certain lands owned by themselves and by other parties to the combination, at greatly increased and exorbitant prices. The directors, accordingly, before the passing of the act, agreed to purchase certain lands at rents or prices greatly exceeding those at which the vendors had purchased the same. After the passing of the act of incorporation, the directors and their confederates proceeded to carry into execution the previously formed design of fraudulently profiting by the establishment of the company and at its expense. The directors, accordingly, on behalf of the company, purchased from themselves, and from the other parties, lands charged with chief or fee-farm rents, greatly exceeding the rents payable to the persons from whom the said vendors had purchased the same. By these means, the company took the land, charged not only with the chief *78 by parties included in subject at a time when was a question*

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

rents reserved to the original landowners, but also with additional rents reserved and payable to the immediate vendors (the directors *et al.*). In further pursuance of the same fraudulent design, the directors, after purchasing the said land for the company, applied about 27,000*l.* of the monies in their hands, belonging to the company, in the purchase or redemption of the rents so reserved to themselves and their associates, leaving the land subject only to the chief rent reserved to the original landowners. The lands purchased by defendants were re-sold by them to the company at a profit and at a price considerably exceeding the real value of the same. Owing to the sums appropriated by the directors to themselves, and paid to others in reduction of the increased chief rents, and payment of such rents, and owing to their having otherwise misapplied monies, the funds of the company in their hands were exhausted, and they raised large sums upon mortgage or incumbrance of lands and property of the company, which they had no authority to do under the act of incorporation. Some of the lands thus mortgaged, though the equitable property of the company, did not stand in the name of the company; and hence some of the mortgagees had no notice of want of authority on the part of the mortgageors.

The bill further alleged, that there had ceased to be a sufficient number of directors to constitute a board for transacting the business of the company; and that, in the present circumstances of the company and of the board of directors, the shareholders had no power to take the property of the company out of the hands of the former directors, or to appoint directors to supply the vacancies, or to wind up, or dissolve, the company, without the assistance of the court.

The bill also alleged, that the defendants concealed from the plaintiffs and the other shareholders the aforesaid fraudulent and improper acts and proceedings; and that plaintiffs and the other shareholders had only recently ascertained the particulars thereof, so far as they were now stated.

The bill prayed, that an account might be taken of the losses and expenses incurred in consequence of the said fraudulent and improper dealings of the defendants with the monies, lands, and property of the company, which they were liable to make good, and that they might be respectively decreed to make good the same, including in particular the profits made by buying and re-selling the said land; that it might be declared that the mortgages upon the lands, etc., created as aforesaid, so far as regards the defendants who executed the same or were privy thereto, were created fraudulently and in violation of the provisions of the act, and that certain of the defendants might be decreed to make good to the company the principal and interest due upon such of the mortgages as were still subsisting; that inquiries might be directed to ascertain which of the mortgages could be avoided and set aside as against the persons claiming the benefit thereof, and that proceedings might be taken for avoiding them accordingly; and that a receiver might be appointed.

Shk have no  
ways relief  
except through  
the court  
the court

Certain of the defendants demurred to the bill, assigning for cause, want of equity, want of parties, and multifariousness.

*Lowndes, Rolt, Walker, and Glasse*, in support of the demurrers.

*James Russell, Roupell, and Bartrum*, for the bill.

WIGRAM, VICE-CHANCELLOR. The relief which the bill in this case seeks, as against the Defendants who have demurred, is founded on several alleged grounds of complaint; of these it is only necessary that I should mention two, for the consideration of those two grounds involves the principle upon which I think all the demurrers must be determined. One ground is, that the directors of the Victoria Park Company, the Defendants *Harbottle, Adshead, Byrom, and Bealey*, have, in their character of directors, purchased their own lands of themselves for the use of the company, and have paid for them, or, rather, taken to themselves out of the monies of the company a price exceeding the value of such lands: the other ground is, that the Defendants have raised money in a manner not authorized by their powers under their act of incorporation; and, especially, that they have mortgaged or incumbered the lands and property of the company, and applied the monies thereby raised in effect, though circuitously, to pay the price of the land which they had so bought of themselves.

[Part of opinion omitted.]

For the present purpose, I shall assume that a case is stated, entitling the company, as matters now stand, to complain of the transactions mentioned in the bill.

The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. And from the case of the *Attorney-General v. Wilson*<sup>1</sup> (without going further), it may be stated as undoubted law, that a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. This bill, however, differs from that in the *Attorney-General v. Wilson* in this, — that instead of the corporation being formally represented as plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of, — the plaintiffs assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself.

It was not, nor could it successfully be argued, that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be, whether

<sup>1</sup> Cr. & Ph. 1.

Two grounds\*

Yr.

u.r.

Inj. to corp. as well as individuals

The corp. is being sued as of.

But this is not a corporation

Gr.

the facts alleged in this case justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative.

The demurrers are, — first, of three of the directors of the company, who are also alleged to have sold lands to the corporation under the circumstances charged; secondly, of *Bealey*, also a director, alleged to have made himself amenable to the jurisdiction of the Court to remedy the alleged injuries, though he was not a seller of land; thirdly, of *Denison*, a seller of land, in like manner alleged to be implicated in the frauds charged, though he was not a director; fourthly, of Mr. *Bunting*, the solicitor, and Mr. *Lane*, the architect of the company. These gentlemen are neither directors nor sellers of land, but all the frauds are alleged to have been committed with their privity, and they also are in this manner sought to be implicated in them. The most convenient course will be, to consider the demurrer of the three against whom the strongest case is stated; and the consideration of that case will apply to the whole.

The first objection taken in the argument for the Defendants was, that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion, to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on the part of the Defendants. I think there are cases in which a suit might properly be so framed. Corporations like this, of a private nature, are in truth little more than private partnerships; and in cases which may easily be suggested, it would be too much to hold, that a society of private persons associated together in undertakings, which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights, inter se, because, in order to make their common objects more attainable, the crown or the legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord *Cottenham* in *Wallworth v. Holt*,<sup>1</sup> and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

But, on the other hand, it must not be without reasons of a very urgent character that established rules of law and practice are to be departed from, — rules, which, though in a sense technical, are founded on general principles of justice and convenience; and the question is, whether a case is stated in this bill, entitling the Plaintiffs to sue in their

<sup>1</sup> 4 Myl. & Cr. 635. See also 17 Ves. 320, per Lord *Eldon*.

Indiv. members  
may sue for an  
inj. corp. by  
other members  
in a proper case

But it must be  
urgent

private characters. [His Honor stated the substance of the act, sections 1, 38, 39, 43, 46, 47, 48, 49, 67, 70, 114, and 129.<sup>1</sup>] The result of these clauses is, that the directors are made the governing body, subject to the superior control of the proprietors assembled in general meetings; and, as I understand the act, the proprietors so assembled have power, due notice being given of the purposes of the meeting, to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they may have originated. There may possibly be some exceptions to this proposition, but such is the general effect of the provisions of the statute.

the whole body  
is sh<sup>d</sup> be act  
be control dir!

Now, that my opinion upon this case may be clearly understood, I will consider separately the two principal grounds of complaint to which I have adverted, with reference to a very marked distinction between them. The first ground of complaint is one which, though it might *prima facie* entitle the corporation to rescind the transactions complained of, does not absolutely and of necessity fall under the description of a void transaction. The corporation might elect to adopt those transactions, and hold the directors bound by them. In other words, the transactions admit of confirmation at the option of the corporation. The second ground of complaint may stand in a different position; I allude to the mortgaging in a manner not authorized by the powers of the act. This, being beyond the powers of the corporation, may admit of no confirmation whilst any one dissenting voice is raised against it. This distinction is found in the case of *Preston v. The Grand Collier Dock Company*.<sup>2</sup>

Cor<sup>p</sup> might avoid  
the E<sup>d</sup> v<sup>c</sup> s<sup>c</sup>  
but doesn't want  
to. can affirm

Cor<sup>p</sup> can't affirm  
by any an<sup>d</sup> v<sup>r</sup>  
act.

On the first point, it is only necessary to refer to the clauses of the act to shew, that, whilst the supreme governing body, the proprietors at a special general meeting assembled, retain the power of exercising the functions conferred upon them by the act of incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the Plaintiffs on the present record. This in effect purports to be a suit by cestui que trusts, complaining of a fraud committed or alleged to have been committed by persons in a fiduciary character. The complaint is, that those trustees have sold lands to themselves, ostensibly for the benefit of the cestui que trusts. The proposition I have advanced is, that although the act should prove to be voidable, the cestui que trusts may elect to confirm it. Now, who are the cestui que trusts in this case? The corporation, in a sense, is undoubtedly the cestui que trust; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the

Can't tell the v<sup>r</sup>  
whether Cor<sup>p</sup>  
will not yet  
affirm

Cor<sup>p</sup> may s.  
character here  
act like my  
sh<sup>d</sup>?

<sup>1</sup> *Supra*, p. 464, n., et seq.

<sup>2</sup> 11 Sim. 327, *S. C.*; 2 Railway Cases, 335.



powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the Court may be declaring the acts complained of to be void at the suit of the present Plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained, it must be shewn either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion: this latter point is nowhere suggested in the bill: there is no suggestion that an attempt has been made by any proprietor to set the body of proprietors in motion, or to procure a meeting to be convened for the purpose of revoking the acts complained of. The question then is, whether this bill is so framed as of necessity to exclude the supposition that the supreme body of proprietors is now in a condition to confirm the transactions in question; or, if those transactions are to be impeached in a court of justice, whether the proprietors have not power to set the corporation in motion for the purpose of vindicating its own rights.

[The learned judge then controverted the plaintiff's position that, upon the allegations of the bill, it must be regarded as impossible to now legally convene a general meeting of the shareholders. He was of opinion that certain clauses in the act were merely directory, and that a general meeting could be called even if the corporation lacked certain officers. He also held, "that the existence of a board of directors *de facto* is sufficiently apparent upon the statements in the bill." In this discussion he said — "I have applied strictly the rule of making every intendment against the pleader in this case, . . . : " also — ". . . I have felt bound in favor of the defendants to construe this bill with strictness."]

The second point which relates to the charges and incumbrances alleged to have been illegally made on the property of the company is open to the reasoning which I have applied to the first point, upon the question whether, in the present case, individual members are at liberty to complain in the form adopted by this bill; for why should this anomalous form of suit be resorted to, if the powers of the corporation may be called into exercise? But this part of the case is of greater difficulty upon the merits. I follow, with entire assent, the opinion expressed by the *Vice Chancellor* in *Preston v. The Grand Collier Dock Company*, that, if a transaction be void, and not merely voidable, the corporation cannot confirm it, so as to bind a dissenting minority of its members. But that will not dispose of this question. The case made with regard to these mortgages or incumbrances is, that they were executed in violation of the provisions of the act. The mortgagees are not

So I called  
yet on assent  
individual shh

Since shh meeting  
is called

Act 20/1-

defendants to the bill, nor does the bill seek to avoid the security itself, if it could be avoided, on which I give no opinion. The bill prays inquiries with a view to proceedings being taken aliunde to set aside these transactions against the mortgagees. The object of this bill against the defendants is to make them individually and personally responsible to the extent of the injury alleged to have been received by the corporation from the making of the mortgages. Whatever the case might be, if the object of the suit was to rescind these transactions, and the allegations in the bill shewed that justice could not be done to the shareholders without allowing two to sue on behalf of themselves and others, very different considerations arise in a case like the present, in which the consequences only of the alleged illegal acts are sought to be visited personally upon the directors. The money forming the consideration for the mortgages was received, and was expended in, or partly in, the transactions which are the subject of the first ground of complaint. Upon this, one question appears to me to be, whether the company could confirm the former transactions, take the benefit of the money that has been raised, and yet, as against the directors personally, complain of the acts which they have done, by means whereof the company obtains that benefit which I suppose to have been admitted and adopted by such confirmation. I think it would not be open to the company to do this; and my opinion already expressed on the first point is, that the transactions which constitute the first ground of complaint may possibly be beneficial to the company, and may be so regarded by the proprietors, and admit of confirmation. I am of opinion that this question, — the question of confirmation or avoidance, — cannot properly be litigated upon this record, regard being had to the existing state and powers of the corporation, and that therefore that part of the bill which seeks to visit the directors personally with the consequences of the impeached mortgages and charges, the benefit of which the company enjoys, is in the same predicament as that which relates to the other subjects of complaint. Both questions stand on the same ground, and, for the reasons which I stated in considering the former point these demurrers must be allowed.

not an attempt to avoid.

obj being to make D's personally liable as corp

If D's does dec. to affirm & pt transactions & still get benefit & raised by mltys. Can it then complain?

It can't be litigated on this record

There may be a case in which it is so obviously demerit a suit that a refusal to bring it will be for be regarded as pth. even tho no proof of actual corrupt: be made.

GROEL v. UNITED ELECTRIC COMPANY.

1905. 70 N. J. Eq. 616.

GARRISON, V. C. From the above statement of the contents of the pleadings, it will appear that the following excerpts from the brief of counsel for the defendants correctly define the issue: —

"The bill in this case was filed to compel the United Gas Improvement Company to account to the United Electric Company of New Jersey for the profits alleged to have been made by the gas company secretly.

Un. Electric Co. sues to compel Gas Co. as Pm to pay back secretly.

Electric Co. made of

in the promotion of the electric company. The gas company and the electric company are named in the bill as defendants, but it is obvious that the gas company is the only defendant against which a decree can be made. The electric company was made a party as required by the practice in cases where a stockholder is permitted to bring suit to enforce a claim which the company should have prosecuted voluntarily. . . .

"The electric company filed the plea for the reasons stated therein, and in the schedules thereto annexed, and insists that as it thinks the bringing of such a suit is inexpedient, all things considered, it has a right to prohibit any stockholder from doing so who differs with the judgment of its board of directors on that subject."

A stockholder sets up that approximately \$20,000,000 of stock as a secret profit was made by the promoter out of the incorporation of the company of which he is a stockholder. He sues the promoter and joins his corporation, which has refused to bring the suit, to recover the \$20,000,000 of stock. His corporation responds that it deems it inexpedient to bring the suit. The single point is whether a board of directors may prohibit a stockholder from bringing a suit in behalf of the corporation to recover moneys secretly made by a promoter out of the incorporation of the company, if, in the judgment of the board, it is inexpedient to bring such a suit.

There can be no question that promoters are liable to the corporation for profits secretly made by them in its promotion, and that such liability arises in cases where future allottees of stock are concerned.

There can be likewise no question that where the corporation refuses to bring a suit stockholders may sue in its behalf, joining it as a defendant.

It is true that courts will not interfere, as a rule, with the management of corporations by the directors thereof when they are acting within their powers and in good faith. But whether the directors are acting in good faith and as honest, diligent trustees, or not, will be inquired into by the courts at the instance of stockholders in cases like the present.

"A stockholder has no standing in the court to prosecute such an action except on the refusal of the directors, either actual or presumptive, to prosecute. But such refusal of the directors to prosecute must be an unjustifiable refusal." *Willoughby v. Chicago Junction Railway Co.*, 50 N. J. Eq. (5 Dick.) at p. 667 (Vice-Chancellor Green, 1892).

In the case of *Kessler v. Ensley Company*, 129 Fed. Rep. 397 (at p. 400), the court said: "Of necessity, then, the governing body, in every *intra vires* matter, has a discretion to determine what action to take on the stockholder's request to sue, and when the stockholder comes into court the first question it must determine is whether that discretion has been properly or improperly exercised."

Elect. Co's plea.  
As to it's refusal  
suit was made.  
- Plea made for C  
in direction

G. N.  
Can't sue promoter  
suit.

It won't interfere  
if it's not acting in  
but will inquire  
as to that.

The Supreme Court of the United States reviewed the previous decisions concerning this matter, and announced the true rule in the case of *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U. S. 455; 47 L. Ed. 256:—

"This court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit." And it likewise quoted with approval the following language: "The circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought."

*a must make a thing wrong*

Viewing this case in the light of the principles which must be applied to it, and of the authorities which have been quoted, can it be said that the directors have shown justification for refusing to bring a suit to recover approximately \$20,000,000 of stock improperly obtained by a promoter?

Would it not clearly be held by any court to be a breach of trust for directors to neglect or refuse to recover, or seek to recover, such an amount of stock improperly obtained from it by a promoter?

It is perfectly clear that if the complainant sets forth a good cause of action, and there is a right in the corporation to recover \$20,000,000 of stock from the promoter, it is a clear breach of trust on the part of the directors not to proceed to recover the same.

For them to reply that it is by them deemed inexpedient to do so, is only to emphasize the breach of trust they are committing by not doing so.

I am aware that counsel for the defendant argues that their unwillingness to bring the suit, and that which in their judgment makes it inexpedient to bring the suit, proceeds from their view that the suit cannot succeed. I think I have sufficiently expressed my idea that this issue is not present before me for determination. If, on the face of the bill, it appears that the complainant cannot succeed, then demurrer is the proper remedy. If the bill, however, does set up a good cause of action, then, as I have already pointed out, the plea does not set up any other facts excepting the passage by the directors of a resolution refusing to bring the suit because in their judgment inexpedient.

There was much argument before me upon issues which I do not find in the case, the defendant contending that it had sufficiently shown that the suit ought not to be brought because it could not be successful, and the complainant replying that the statements in the report of the committee, as incorporated into the plea, show clearly that there is a cause of action, and that the defendant has not, on the merits, shown any reason why the suit should not be brought. I do not stop to consider these questions for the reasons given. I find that the complainant sets out a cause of action, and that the defendant replies by plea that it deems it inexpedient to bring a suit for

this cause of action, and that the complainant, its stockholder, is precluded by reason of this fact.

I find that the principle to be applied is that the stockholder may appeal to the discretion of the court in this respect, and upon considering the whole case, I do not think it appears that the defendant was justified in refusing to bring the suit, with the result that the complainant may proceed, and the plea must be overruled. 221 (6)

cf. 105 U.S. 13, 15-16; 11 R.D. 195, 204-07

It is sufficient to pay this bill presents a strong case of total destruction of corporate assets, and the defendant, as a stockholder, is under a duty to maintain a suit to prevent such a disaster. Cf. *Peru*, refused to maintain a suit to prevent such a disaster.

### DODGE v. WOOLSEY.

Corp. Dir: discretion doesn't extend to U.S. act. - *Shkaneau* 1855. 18 Howard (U.S.), 331.<sup>2</sup>

APPEAL from the U. S. Circuit Court for the District of Ohio.

This is a suit in equity by John M. Woolsey, to enjoin the collection of a tax, assessed by the State of Ohio, on the Commercial Branch Bank of Cleveland, a branch of the State Bank of Ohio. The defendants are Dodge, the tax collector, the directors of the bank, and the bank itself.

Woolsey avers that he is a citizen of Connecticut, that he is the owner of thirty shares in the Branch Bank of Cleveland, that Dodge and the other defendants are all citizens of Ohio, and that the Commercial Branch Bank is a corporation, made such by an act of the legislature of Ohio. He alleges that, by the act of incorporation, the Bank was to pay semiannually to the State a certain percentage on its profits, which was to be in lieu of all taxes to which the corporation, or the stockholders on account of their stock, would otherwise be subject. He further alleges that subsequent changes were made by the constitution and statutes of Ohio, undertaking to tax the Bank at a different and more burdensome rate. He asks the Court to enjoin Dodge from collecting by distress a tax which has been assessed against the Bank under this law; contending that the subsequent statute and assessment are in violation of the clause in the U. S. Constitution, which prohibits States from passing laws impairing the obligation of contracts. He finally declares that, as a stockholder of the Bank, he had requested the directors to take measures, by suit or otherwise, to assert the franchises of the Bank against the collection of what he believes to be an unconstitutional tax, and that they had refused to do so.

Dodge filed an answer, in which he denied that Woolsey had made any application to the directors to prevent the collection of the tax. But it was agreed by the counsel that such an application had been

<sup>2</sup> Statement abridged. Only so much of the case is given as relates to one point. — Ed.

made; and that the directors replied that, though concurring in the view that the tax was illegal, yet, in consideration of the many obstacles in the way of testing the law in the Courts of the State, they could not consent to take the action which they were asked to take.

*Spalding and Pugh*, for appellant.

*Stanberry and Vinton*, for appellee.

WAYNE, J. [After stating the case].

Upon the foregoing pleadings and admission, the circuit court rendered a final decree for the complainant, perpetually enjoining the treasurer against the collection of the tax, under the act of the 13th February, 1852, and subjecting the defendant, Dodge, to the payment of the costs of the suit. From that decision the defendant, Dodge, has appealed to this court.

His counsel have relied upon the following points to sustain the appeal:

1. The complainant does not show himself to be entitled to relief in a court of chancery, because the charter of the bank provides that its affairs shall be managed by a board of directors, and that they are not amenable to the stockholders for an error of judgment merely. And that in order to make them so, it should have been averred that they were in collusion with the tax collector in their refusal to take legal steps to test the validity of the tax.

2. It was urged that this suit had been improperly brought in the circuit court of the United States for the district of Ohio, because it is a contrivance to create a jurisdiction, where none fairly exists, by substituting an individual stockholder in place of the Commercial Bank as complainant, and making the directors defendants; the stockholder being made complainant, because he is a citizen of the State of Connecticut, and the directors being made defendants to give countenance to his suit.

3. It was said, if the foregoing points were not available to defeat the action, that it might be contended that the defendant was in the discharge of his official duty when interrupted by the mandate of the circuit court, and that the tax had been properly assessed by the law of the State, in conformity with its constitution, of the 1st September, 1851.

We will consider the points in their order. The first comprehends two propositions, namely: that courts of equity have no jurisdiction over corporations, as such, at the suit of a stockholder for violations of charters, and none for the errors of judgment of those who manage their business ordinarily.

There has been a conflict of judicial authority in both. Still, it has been found necessary, for prevention of injuries for which common-law courts were inadequate, to entertain in equity such a jurisdiction in the progressive development of the powers and effects of private corporations upon all the business and interests of society.

It is now no longer doubted, either in England or the United States,

that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. 2 Russ. & Mylne Ch. R., *Cunliffe v. Manchester and Bolton Canal Company*, 480, *n.*; *Ware v. Grand Junction Water Company*, 2 Russ. & Mylne, 470; *Bagshaw v. Eastern Counties Railway Company*, 7 Hare Ch. R. 114; *Angell & Ames*, 4th ed. 424, and the other cases there cited.

It was ruled in the case of *Cunliffe v. The Manchester and Bolton Canal Company*, 2 Russ. & Mylne Ch. R. 481, that where the legal remedy against a corporation is inadequate, a court of equity will interfere, and that there were cases in which a bill in equity will lie against a corporation by one of its members. "It is a breach of trust towards a shareholder in a joint stock incorporated company, established for certain definite purposes prescribed by its charter, if the funds or credit of the company are, without his consent, diverted from such purpose, though the misapplication be sanctioned by the votes of a majority; and, therefore, he may file a bill in equity against the company in his own behalf to restrain the company by injunction from any such diversion or misapplication." In the case of *Ware v. Grand Junction Water Company*, 2 Russell & Mylne, a bill filed by a member of the company against it, Lord Brougham said: "It is said this is an attempt on the part of the company to do acts which they are not empowered to do by the acts of parliament," meaning the charter of the company; "so far I restrain them by injunction." "Indeed, an investment in the stock of a corporation must, by every one, be considered a wild speculation, if it exposed the owners of the stock to all sorts of risk in support of plausible projects not set forth and authorized by the act of incorporation, and which may possibly lead to extraordinary losses." The same jurisdiction was invoked and applied in the case of *Bagshaw v. The Eastern Counties Railway Company*; so, also, in *Coleman v. The same company*, 10 Beavan's Ch. Reports, 1. It appeared in that case that the directors of the company, for the purpose of increasing their traffic, proposed to guarantee certain profits, and to secure the capital of an intended steam packet company, which was to act in connection with the railway. It was held, such a transaction was not within the scope of their powers, and

they were restrained by injunction. And in the second place, that in such a case one of the shareholders in the railway company was entitled to sue in behalf of himself and all the other shareholders, except the directors, who were defendants, although some of the shareholders had taken shares in the steam packet company. It was contended in this case that the corporation might pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability was to increase the traffic upon the railway, and thereby increase the traffic to the shareholders. But the master of the rolls, Lord Langdale, said, "there was no authority for anything of that kind."

But further, it is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. And therefore a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied. It is an improper application for a railway company to invest the profits of the company in the purchase of shares in another company.

The result of the cases is well stated in Angell & Ames, paragraphs 391, 393. "In cases where the legal remedy against a corporation is inadequate, a court of equity will interfere, is well settled, and there are cases in which a bill in equity will lie against a corporation by one of its members." "Though the result of the authorities clearly is, that in a corporation, when acting within the scope of and in obedience to the provisions of its constitution, the will of the majority, duly expressed at a legally constituted meeting, must govern; yet beyond the limits of the act of incorporation, the will of the majority cannot make an act valid; and the powers of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed, that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors." . . .

*Rule*

We have then the rule and its limitation. It is contended that this case is within the limitation; or that the directors of the Commercial Bank of Cleveland, in their action in respect to the tax assessed upon it, under the act of April 18, 1852, and in their refusal to take proper measures for testing its validity, have committed an "error of judgment merely."

Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty, than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency. It was a mistake, it is true,

*this is not an error.*



because of the nature of the business, and the fact that the directors are not to be held responsible for the acts of the corporation, but only for the acts of the corporation which are in violation of the law. The directors are not to be held responsible for the acts of the corporation which are in violation of the law. The directors are not to be held responsible for the acts of the corporation which are in violation of the law.

of what their duty required from them, according to their own sense of it, but, being a duty by their own confession, their refusal was an act outside of the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchises of the bank. A sense of duty and conduct contrary to it, is not "an error of judgment merely," and cannot be so called in any case. It amounted to an illegal application of the profits due to the stockholders of the bank, into which a court of equity will inquire to prevent its being made.

Thinking, as we do, that the action of the board of directors was not "an error of judgment merely," but a breach of duty, it is our opinion that they were properly made parties to the bill, and that the jurisdiction of a court of equity reaches such a case to give such a remedy as its circumstances may require. This conclusion makes it unnecessary for us to notice further the point made by the counsel that the suit should have been brought in the name of the corporation, in support of which they cited the case of the Bank of the United States v. Osborn. The obvious difference between this case and that is, that the Bank of the United States brought a bill in the circuit court of the United States for the district of Ohio, to resist a tax assessed under an act of that State, and executed by its auditor, and here the directors of the Commercial Bank of Cleveland, by refusing to do what they had declared it to be their duty to do, have forced one of its corporators, in self-defense, to sue. If the directors had done so in a State court of Ohio, and put their case upon the unconstitutionality of the tax act, because it impaired the obligation of a contract, and had the decision been against such claim, the judgment of the State court could have been re-examined, in that particular, in the supreme court of the United States, under the same authority or jurisdiction by which it reversed the judgment of the supreme court of Ohio, in the case of the Piqua Branch of the State Bank of Ohio v. Jacob Knoop, treasurer of Miami county, 16 How. 369.

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Decree of Circuit Court affirmed.

CATRON, J., DANIEL, J., and CAMPBELL, J., dissented.

Of 17th Mo. 400, 417-20. Miller tells what it decided. 12. 3. When a corps or its  
 its prop are threatened can infy. such a nature, & it will inform but it refuses to take any legal  
 steps to protect as, a stock may maintain a bill in eq. vs. a party threatening or mischievous corp to restrain  
 by injunction & recommit. & active protect his int. & interest. 2. 9. But no case is cited nor does any dict  
 in opinion or it is to be kept in mind that when a corp has been injured by a tort or a contract, or has any right  
 act legal or eq. vs. a party an action may come into it & it is not to be said that a corp fails or refuses  
 to do so. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.



the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation.

In this case the tax sought to be avoided was assessed against the Chicago, Rock Island, and Pacific Railroad Company, and the decree rendered discharges the company from the payment of this tax. The corporation, therefore, should have been made a party to the suit, and as it was not, the demurrer should have been sustained.

DECREE REVERSED, and the cause remanded for further proceedings,

1210 In conformity with this opinion.

*The Court holds that who are the wrongdoers have refused to be connected,*  
 KNOWLTON, J., IN DUNPHY v. TRAVELLER NEWSPAPER ASSOCIATION.  
*still here it must be shown who are the wrongdoers.*

1888. 146 Massachusetts, 495, p. 498.

KNOWLTON, J. . . . The only exception to the rule that a stockholder must apply to the directors, and also if need be to the corporation, for redress of a wrong done it, before he can sue in a court of equity, for himself and in behalf of other stockholders, is when it appears that such application would be unavailing to protect his rights. *Brewer v. Boston Theatre*, 104 Mass. 378. *Allen Wilson*, 28 Fed. Rep. 667. *Hawes v. Oakland*, 104 U. S. 450. *Detroit v. Dean*, 106 U. S. 537. *Dimpfell v. Ohio & Mississippi Railway*, 110 U. S. 209. *Foss v. Harbottle*, 2 Hare, 461. That may happen when the directors themselves are the wrongdoers, or are in fraudulent combination with them, or when the corporation is controlled by them, or when it is necessary that action should be taken too speedily to leave time for a corporate meeting of stockholders.

In the case at bar there is an averment that Roland Worthington, the alleged wrongdoer, has for a long time controlled a majority of the stock, and has elected such persons directors as he chose. That states a sufficient reason for not applying to the corporation, at a meeting of its members, for action to redress its wrongs. But it is not alleged that the plaintiff ever attempted to move the directors in the interest of the corporation in the matters complained of, or that any good reason existed for his failure so to do. It does not even appear who or how many the directors are. It is said that the defendants Roland Worthington and Roland Worthington the younger are directors, but no others are named. The law provides that there shall be at least three, and it is to be presumed that there are others besides these defendants. Rev. Sts. c. 38, § 3. Pub. Sts. c. 106, § 25. There is no allegation of fraud, or of wrongful combination with

*Reasons for not applying began nearly and rising suddenly*

*of 1889-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-00-01-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-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Roland Worthington, or of other misconduct, on the part of any of them. And it cannot be presumed, in the absence of such averments, that they would refuse to do their duty if their attention were called to it.

In *Brewer v. Boston Theatre, ubi supra*, — a much stronger case for the plaintiff than this, — an allegation was in these words: "A majority of the present board of directors of said defendant corporation are acting in the interest of, and are under the control of, Tompkins and Thayer," the authors of the alleged frauds; and it was held that this allegation did not set forth a sufficient reason for bringing a suit without first requesting the directors to do it.<sup>1</sup> 205-6.

<sup>1</sup> The following "Additional Rule of Practice in Equity," No. 94, was promulgated by the U. S. Supreme Court, Jan. 23, 1882, and is printed in vol. 104 U. S. Preface, ix. : —

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

cf 213 250 v 257 182 3221  
Rule applies only to suits by a shh to enforce a rt. a corp & not to suits to enforce shh's indiv<sup>d</sup> rights such as a suit for rescission, a C of subscrip<sup>n</sup> to shares on cgrd. frd. 89. 4-783.

what is sufficient demand cf 186 226 9; 445-89.

material must be proved nothing

cf 112 722  
98 3 158  
110 4 227

2. If he is a m. & if he acts for the corp. & m. forms he can deal as a m. by the Corp. Act 102  
 So can buy in corp. prop. re 89 & 123; 118 & 476, 80.  
 But actg as a m. they owe a estm. duty to corp. - Not b. fiduciary; 89 & 123 of 5 York 449,  
 508 BREWER v. BOSTON THEATRE. 4 118 & 476-80

(E) To prevent and redress an Appropriation of Corporate Assets by the Majority.

WELLS, J., IN BREWER v. BOSTON THEATRE et al.

1870. 104 Massachusetts, 378, pp. 394-397.1

WELLS, J. . . . The defendants contend that the corporation cannot be deprived of its right to determine, in all matters not *ultra vires*, whether to impeach or to ratify transactions supposed to be prejudicial to its interests. Granting this position, it would result that in no case, as to matters *intra vires*, could a suit be maintained by individual stockholders to enforce rights or redress wrongs of the corporate body, except where the delay necessary in order to secure corporate action might defeat or endanger the attainment of appropriate relief. If, when called upon to act, the corporate body should elect to confirm the supposed wrongful transactions, or should do so indirectly by refusal to act, they would no longer be open to impeachment. If, on the other hand, it should determine to take action, it would do so in its own name and behalf; and there would be no ground of necessity for proceedings in the name of the individual corporator.

We are not prepared to say that this would not be the case in all matters to which the only objection is that they are prejudicial, or supposed to be so, to the corporate interests merely, but not illegal in themselves, and affecting all the corporators alike. Perhaps it would be so whenever the surrender of property or the release of rights, acquired by the corporation through the transactions sought to be impeached, is necessary in order to reach the proper remedy. *Great Luxembourg Railway Co. v. Magnay*, 25 Beav. 586. The corporation might be entitled to determine for itself exclusively whether it would retain or release property or rights thus acquired, although it thereby precluded, or rendered ineffectual, all proceedings against parties who may have made illegal or fraudulent gains out of the transactions. These questions, however, we need not at present decide.

The cases now before us involve no release of property or rights by the corporation. The alleged wrongs are not merely prejudicial to the interests of the corporation; but are such as tend to deprive one part of the corporators of their rightful share in the fruits of the common property and business, for the advantage of others of the corporators. This inequality and injustice is accomplished by means of the control over the corporate organization and management, which has been secured by the parties so benefited. By the amendments to the several bills it is alleged that such control has been exercised since the year

<sup>1</sup> This was a bill in equity, brought by minority stockholders, against the corporation and against certain directors and other individuals, for fraudulently conspiring to lease the corporate property on a rent much below the market value and share in the profits of the lessees. The bill (as amended) alleged that individual defendants own or control a majority of the stock and control the proceedings at stockholders' meetings; also that a majority of the directors are fraudulently colluding with these defendants to continue to them the control of the corporation and its property. A demurrer was overruled. — Ed.

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from committing waste i.e. eq prevents unconsc. use & all fair right or threatens  
irreparable harm.

1866, inclusive, by Tompkins and Thayer, with the aid of the other defendants. That which is important is the fact of such control and its exercise for such purpose, rather than the means by which it has been obtained. A majority of the corporators have no right to exercise the control over the corporate management, which legitimately belongs to them, for the purpose of appropriating the corporate property or its avails or income to themselves or to any of the shareholders, to the exclusion or prejudice of the others. And if any have obtained such unfair advantage by fraud or abuse of the trust confided to them as officers or agents of the corporation, it is not in the power of a majority to ratify or condone the fraud and breach of trust, so far as it affects the rights of the others, without reasonable restitution. This proposition, if stated in reference to formal transactions, such as assessments of capital or dividends of income, would not be questioned. *Preston v. Grand Collier Dock Co.*, 11 Sim. 327. *Hodgkinson v. National Live Stock Insurance Co.*, 26 Beav. 473. But the indirect appropriation of the common property, profits or means of profit, to their own benefit, by any portion of the corporators, in fraud of their associates, is equally incapable of being authorized or ratified by the vote of a majority of the corporators, or by any act or omission of the corporate body. *Gregory v. Patchett*, 33 Beav. 595. *Atwool v. Merryweather*, Law Rep. 5 Eq. 464, note. If it were otherwise, the minority would be without means of protection or redress against inequality and injustice. They would be equally so if they could obtain redress only in the name and through the action of the corporation itself. Such acts are wrongs done primarily to the corporation; and therefore the restitution or redress is to be secured to the corporation. But in their effect and essential character they are wrongs to the individual shareholder, inflicted upon his corporate interests by means of the control over those interests secured through the corporate organization and management. He can seek his redress only through the corporation; but that does not give the corporation the right to deprive him of all redress. Any attempt to do so, whether regarded as the action of the corporation or of a majority of shareholders, would have the same voidable character as the original wrong. Officers of a corporation, dealing with it in matters of their own individual interest, stand very differently in this respect from strangers, who have no occasion to regard any other than the corporate body. If by means of their relations to the corporate management they secure to themselves undue advantage over their associates, they cannot retain it. Such transactions are voidable, not merely for want of authority in the officers by whom they are done, but because neither the officers nor the corporation itself, by whatever majority of votes it may act, can do, assent to, or confirm them. The wrong to the individual shareholder is the same, whether committed with the concurrence or subsequent approval and adoption of his associates controlling the corporation, or without it.

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In our opinion, the facts of these cases, as set forth in the several amended bills, show such abuse of authority and breaches of trust by the defendants, in misappropriating the income of the corporate property to the benefit of themselves or of some of them, as cannot be ratified or remitted by the corporation; and also such incapacity of the plaintiffs to move the corporation to take action for their redress, as entitles them, from necessity, to seek it in the form of these proceedings.

In the first and second of the bills a majority of the present directors are not joined as parties; but the necessity for the mode of proceeding adopted is shown by the allegations that Tompkins and Thayer own or control a majority of the stock and control all meetings of the corporation, and that a majority of the present directors are knowingly, wilfully, and fraudulently endeavoring to continue and secure such control to them. *8 Nov. 1900*

*Prayer for relief seems to have been to require the directors to act for the benefit of the company and to secure the same by the proper action of the company. Duns 399*

### MENIER v. HOOPER'S TELEGRAPH WORKS.

1874. L. R. 9 Chan. Ap. 350.

*But the bill in this case was filed by E. J. Menier, on behalf of himself and all other the shareholders of the European and South American Telegraph Company (except such of them as were Defendants), against a company called Hooper's Telegraph Works, W. Hooper, H. W. Grace, and the European and South American Telegraph Company, and stated (amongst other things) as follows: — That the European Company was incorporated in 1871 with the object of carrying out an agreement between the Plaintiff, Menier, and one Bradford, and others, for constructing a submarine telegraph from Europe to South America, under certain conventions and decrees of foreign governments. The capital of the company was to be £1,250,000, in 62,500 £20 shares, and by the articles of association provisions were made for holding meetings of the company, at which every member was to have one vote for every share held by him. That Hooper's Company were to make and lay down for the European Company telegraph cables from Portugal to Brazil. That a prospectus was issued and many shares were applied for, but in consequence of objections raised the directors determined not to proceed with the allotment to the public, and the only shares allotted were 3000 to Hooper's Company, 2000 to the Plaintiff, and 325 to thirteen persons, ten of whom were the directors. That £3 was paid on each of the shares so allotted. That one of the concessions for making the telegraph had been granted to the Baron de Maua, who was at one time chairman of the European Company, and this concession was claimed by the European Company. That a bill was filed in this Court by the European Company against the Baron de Maua and another company, praying a declaration that the Baron de Maua was a trustee of the concession for the*

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*European Company*, and that he might be restrained from transferring it to any one else. That a motion was made for an interlocutory injunction, and was refused by the Vice-Chancellor *Malins*, but on the balance of convenience only. That the *European Company*, and also *Hooper's Company*, at first intended to appeal against the order of the Vice-Chancellor *Malins*. That *Hooper's Company* afterwards determined not to appeal, and then the directors of the *European Company* determined not to appeal, but to take steps for winding up the *European Company*. That the Plaintiff was resident in *Paris* and ignorant of English law, and believed that any arrangements adopted by the directors would be for the benefit of the *European Company*, and not exclusively in the interests of *Hooper's Company*. That the Plaintiff wished the appeal to proceed, and offered to bear the costs. That on the 12th of February, 1873, an extraordinary meeting of the *European Company* was held, at which a resolution was passed that the company be wound up voluntarily, and that the Defendant *Crace* be the liquidator. That the resolution was proposed by one *Kennedy*, a director of *Hooper's Company*, and that *Crace* was secretary of *Hooper's Company*. That this resolution was confirmed at another extraordinary meeting, at which five persons only were present, of whom three were directors nominated by *Hooper's Company*, and one was *Crace*, the secretary. That the Plaintiff protested against these proceedings. That the Plaintiff was then ignorant, but had since discovered, that these proceedings took place through the influence of *Hooper's Company*. The bill then stated the circumstances of an arrangement between *Hooper's Company* and the *Telegraph Construction and Maintenance Company* and the Baron de *Maua*, under which it would be to the advantage of *Hooper's Company* that the agreement between them and the *European Company* should be put an end to, in order to benefit Baron de *Maua's Company*, and in order that *Hooper's Company* might sell to another company the cable they were making for the *European Company*. That these arrangements were concealed from the Plaintiff and the other shareholders in the *European Company*. That *Hooper's Company* procured the abandonment of the suit against the Baron de *Maua*, and the winding-up of the *European Company*, through the influence which they had as holders of 3000 shares in the *European Company*, and through the influence of the directors nominated by them.

And the bill prayed that *Hooper's Company* might be declared not entitled to the benefit of the profits derived from the abandonment of the suit and other arrangements aforesaid, and might be declared a trustee of those profits for the Plaintiff and the other shareholders in the *European Company*; and that the *European Company* and the Defendants might be restrained from repaying to *Hooper's Company* any of the money paid on the allotment of shares in the *European Company*, and from disposing of the property of the *European Company*.



To this bill the Defendants *Hooper's Company* and *W. Hooper* demurred for want of equity; and the Defendants *Crace* and the *European Company* also demurred, and for cause of demurrer shewed that the Plaintiff had not made out such a case as entitled him to discovery or relief.

The Vice-Chancellor *Bacon*, on the 12th of January, 1874, overruled both demurrers; and the Defendants appealed.

Mr. *Fry*, Q. C., and Mr. *Millar*, for *Hooper's Company*:—

A shareholder has a right to vote as he pleases, and to suit his own interests. If not, the Court in every case might have to interfere wherever there was a small majority, and consider what were the motives of each shareholder. If there was a suit by the company against any individual shareholder, he would not be disabled from voting. He is not a trustee for any one, and he may vote against the interests of the company or of any of the other shareholders. No constructive trust can be raised: *Gray v. Lewis*.<sup>1</sup> In *Atwood v. Merryweather*<sup>2</sup> the vote was impeached. If such a suit can be maintained, one shareholder may file a bill to have a certain contract set aside, and another to have it carried on. Such a suit can only be maintained by the company against the directors. At all events, the proceedings ought to be in the liquidation, and not by bill.

Mr. *Kay*, Q. C., Mr. *Jackson*, Q. C., and Mr. *Everitt*, for the Plaintiff, were not called upon.

SIR W. M. JAMES, L. J.:—

I am of opinion that the order of the Vice-Chancellor in this case is quite right.

The case made by the bill is very shortly this: The Defendants, who have a majority of shares in the company, have made an arrangement by which they have dealt with matters affecting the whole company, the interest in which belongs to the minority as well as to the majority. They have dealt with them in consideration of their obtaining for themselves certain advantages. *Hooper's Company* have obtained certain advantages by dealing with something which was the property of the whole company. The minority of the shareholders say in effect that the majority has divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case to be as alleged by the bill, then the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the Court can do it, and given to them.

<sup>1</sup> Law Rep. 8 Ch. 1035.

<sup>2</sup> Law Rep. 5 Eq. 464, n.

It is said, however, that this is not the right form of suit, because, according to the principles laid down in *Foss v. Harbottle*,<sup>1</sup> and other similar cases, the Court ought to be very slow indeed in allowing a shareholder to file a bill, where the company is the proper Plaintiff. This particular case seems to me precisely one of the exceptions referred to by Vice-Chancellor Wood in *Atwood v. Merryweather*,<sup>2</sup> a case in which the majority were the Defendants, the wrong-doers, who were alleged to have put the minority's property into their pockets. In this case it is right and proper for a bill to be filed by one shareholder on behalf of himself and all the other shareholders.

Therefore the demurrer ought to be overruled.

SIR G. MELLISH, L. J. : —

I am entirely of the same opinion.

It so happens that *Hooper's Company* are the majority in this company, and a suit by this company was pending which might or might not turn out advantageous to this company. The Plaintiff says that *Hooper's Company* being the majority, have procured that suit to be settled upon terms favourable to themselves, they getting a consideration for settling it in the shape of a profitable bargain for the laying of a cable. I am of opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them. I also entirely agree that, under the circumstances, the suit is properly brought in the name of the Plaintiff on behalf of himself and all the other shareholders.

The appeal will be dismissed with costs.

Mr. Fooks, Q. C., and Mr. Davey, for the other Defendants, then submitted to have their appeal dismissed, 23<sup>d</sup> 9, 1900

# 151 FARMERS' LOAN AND TRUST CO., AS TRUSTEE, v. NEW YORK AND NORTHERN R. CO.

1896. 150 New York, 410.<sup>3</sup>

ACTION to foreclose a second mortgage upon the property of the New York and Northern R. Company; the mortgage being given by that corporation to the plaintiff as trustee to secure the payment of bonds. The mortgage provided that no foreclosure could be had until the expiration of one year after default in the payment of the interest. Such default had taken place.

<sup>1</sup> 2 Hare, 461.

<sup>2</sup> Law Rep. 5 Eq. 464, n.

<sup>3</sup> Statement abridged. Arguments and part of opinion omitted. — ED.

If a company corp acquires mfg. 1<sup>st</sup> corp's stock & elects dir: as it has a rt both 129 Mich 203 & then them conducts operat<sup>n</sup> injurious to 2<sup>d</sup> Co & minority from redms 111 7639 A conspiracy to work for mfg rather than corp is a conspiracy, m/breach, touch 91 5299, 31274

The Northern R. Company made no defence. Holmes and Pick, minority stockholders in that corporation, were, on their own motion, made parties defendant in the action, and served an answer.

Upon the trial, the following facts appeared :

The New York Central and Hudson River R. R. Company and the Northern Company are parallel lines and were competing lines. The Central purchased a majority of the stock and a majority of the second mortgage bonds of the Northern for the sole purpose of obtaining control of the property of the latter corporation. The Central, as such majority stockholder, acquired the entire control of the affairs of the Northern; dictating and governing the action of the board of directors of the Northern. The present action was procured to be commenced by the Central.

On the trial, Holmes and Pick sought to prove that after the Central became the owner of such stock and bonds, and while its officers were in substantial control of the Northern, they declined to accept traffic from other roads that would have produced a fund with which to pay the interest due on the bonds; that the income of the road which should have been employed to pay such interest was used for other and improper purposes; and that such action caused the inability of the Northern to pay the interest and thus cure its default. This evidence was rejected as immaterial. Holmes and Pick excepted to the ruling.

The trial court *held* that the plaintiff was entitled to judgment of foreclosure and sale. This decision was affirmed by the General Term (78 Hun, 213). The minority stockholders appealed from this judgment.

*James O. Carter and Simon Sterne*, for appellants.

*Ashbel Greene, David McClure, and Thomas Thacher*, for respondents.

MARTIN, J. . . . In determining the correctness of the rulings made by the trial court, it becomes necessary to determine incidentally whether a corporation, purchasing a majority of the stock of another competing corporation, may thus obtain control of its affairs, cause it to divert the income from its business, or to refuse business which would enable it to pay the interest for which it was in default, and then institute an action in equity to enforce its obligations for the purpose of obtaining control of its property at less than its value to the injury of the minority stockholders, and they have no remedy. Or, in other words, whether a court of equity, with those facts established, would lend its aid to such a stockholder by enforcing the mortgage and decreeing a foreclosure and sale of the mortgaged premises, at its request, in its behalf, and to accomplish such a purpose. If it would, then the rulings of the trial court were proper; if not, then the appellants were entitled to prove those facts, and it was error to reject the evidence.

[After citing and stating various decisions.]

"The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the majority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders. Thus, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority upon an application by the latter." (2 Cook on Stock and Stockholders [2d ed.], § 662, p. 945.) The same principle is stated in 1 Morawetz on Private Corporations (2d ed., § 529); 1 Beach on Private Corporations (§ 70); 2 Bigelow on Frauds (§ 645), and Beach on Mod. Eq. Juris. (§§ 132, 686).

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While the question in some of the cases cited arose between stockholders and the directors and officers of a company, who as such held a position of trust as to the former, still, where, as in this case, a majority of the stock is owned by a corporation or a combination of individuals, and it assumes the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that for all practical purposes it becomes the corporation of which it holds a majority of stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its stockholders, and, therefore, under such circumstances, the rule stated in the *Sage* and other similar cases applies to majority stockholders who control the affairs of the company, as well as to its directors or officers.

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The principle of these authorities renders it quite obvious that a corporation, purchasing a majority of the stock of another competing one, cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations, for the avowed purpose of obtaining entire control of its property to the injury of the minority stockholders. Such a course of action is clearly opposed to the true interests of the corporation itself, plainly discloses that one thus acting was not influenced by any honest desire to secure such interests, but that its action was to serve an outside purpose, regardless of consequences to the debtor company, and in a manner inconsistent with its interest and the interest of its minority stockholders.

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The respondents, however, contend that the doctrine of the authorities cited is not controlling in this case, but that the New York Central and Hudson River Railroad Company had a right to purchase a majority of the stock and bonds of the New York and Northern Railway Company, for the express purpose of obtaining control of the affairs of the latter for its own use and benefit, and to thus acquire

its property at less than its actual value, to the injury of the minority stockholders, and that such stockholders had no remedy in law or in equity to protect themselves against such action of the majority stockholder, although it diverted the income which should have been applied to the payment of such interest to other and improper purposes, and refused business which would have enabled the defaulting company to pay its interest. In other words, the claim of the respondents is, and the General Term in effect held, that the purpose for which the New York Central and Hudson River Railroad Company obtained a majority of the stock and bonds of the New York and Northern Railway Company is entirely immaterial, and that notwithstanding the existence of such a purpose, a court of equity will aid them in enforcing the mortgage. To sustain this contention they cite *Morris v. Tuthill* (72 N. Y. 575); *Phelps v. Nowlen* (72 N. Y. 39); *Chenango Bridge Co. v. Paige* (83 N. Y. 178); *Ramsey v. Erie Railway Co.* (8 Abb. Pr. [N. S.] 174); *Clinton v. Myers* (46 N. Y. 511); *Simpson v. Dall* (3 Wall. 476); *Oglesby v. Attrill* (105 U. S. 605); *Adler v. Fenton* (24 How. [U. S.] 407), and *Beveridge v. N. Y. E. R. Co.* (112 N. Y. 1).

In *Morris v. Tuthill* the action was to foreclose a mortgage brought by an assignee. There was no question or principle of trust involved in that case. The plaintiff owed the defendant no duty, and, hence, it was held that under such circumstances the plaintiff had a right to maintain an action for the foreclosure of the mortgage, although he took title to it from motives of malice, and the assignor assigned the mortgage to him from a like motive. That that case was correctly decided we have no doubt, but it is clearly distinguishable in principle from the case at bar, and has no bearing whatever upon the question under consideration.

In the *Phelps* case it was held that a party was not liable for the consequences of an act done upon his own land, lawful in itself, which did not infringe upon any lawful right of another, simply because he was influenced in doing it by wrong and malicious motives, and that courts would not inquire into the motives actuating a person in the enforcement of a legal right. How the doctrine of that case is applicable to the question involved in this, it is difficult to perceive. In that case the party simply exercised a lawful right, and the court held that no liability arose from his having done so. There the plaintiff owed the defendant no duty and sustained no relation of trust towards him, and, hence, it is clearly distinguishable from the case at bar. The same may be said of *Chenango Bridge Co. v. Paige*, *Ramsey v. Erie Railway Co.*, *Clinton v. Myers*, *Simpson v. Dall*, *Oglesby v. Attrill*, and *Adler v. Fenton*. We do not think these cases in any way aid the respondents.

[After discussing the *Beveridge* case.]

As we have already seen, there are circumstances under which the

majority stockholders occupy substantially the same relation of trust towards the minority as the board of directors would occupy towards the stockholders it represents, and, hence, where there are corrupt motives, personal interest or fraud, the case cited is an authority to sustain the conclusion which we have already reached.

That any person or corporation authorized to do so might have purchased the bonds of the New York and Northern Railway Company, and have rigorously enforced them by a sale of its property, there can be no doubt. They might also have purchased the stock of the company and thus have become the owners of both; and while such owners might have enforced the liability of the company upon its bonds, so long as they acted in good faith and their purpose was proper; but when the New York Central and Hudson River Railroad Company purchased the stock and bonds in question, thus obtaining a controlling interest in the affairs of the New York and Northern Railway Company for the avowed purpose of destroying it, to serve a purpose entirely outside of that for which it was organized, and in hostility to it, it becomes clear that as such stockholder it owed a duty to the minority stockholders, that the law implied a *quasi* trust upon its part, and that a court of equity will not aid it in the destruction of that corporation and a confiscation of its property, although it held a majority of its stock and the required amount of its bonds.

Hence, we are of the opinion that the court erred in rejecting as immaterial evidence offered by the appellants to show that, after the New York Central and Hudson River Railroad Company became the owner of a majority of the stock and bonds of the New York and Northern Railway Company, and while its officers were in control of the latter corporation and its affairs, it declined to accept traffic from other roads which would have produced a fund with which to pay the interest that was due; that the income of the road, which should have been employed to pay such interest, was used for other and improper purposes, and that such action upon the part of the majority stockholder occasioned the inability of the company to pay the interest and cure the default. To the rejection of this evidence the defendants excepted. We think many of these rulings were erroneous, and that the appellants had the right to make the proof offered, so far as it related to the transaction of the business of the New York and Northern Railway Company during the time the New York Central and Hudson River Railroad Company owned a majority of its stock and controlled its affairs, and for the error in those rulings the judgment should be reversed.

The respondents claim that by virtue of the provisions of section forty of the Stock Corporation Law the New York Central and Hudson River Railroad Company had the right to acquire the stock of the New York and Northern Railway Company. We do not deem it necessary to either discuss or decide that question, for if it be

admitted that the New York Central and Hudson River Railroad Company was authorized to purchase such stock and bonds, still nothing will be found in the statute which authorizes it to employ them for the purpose of destroying the property of the New York and Northern Railway Company to the injury of its minority stockholders., r,

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### § BEATTY v. NORTHWESTERN TRANSPORTATION CO.

1887. (*Judicial Committee of Privy Council*), L. R. 12 App. Cases, 589.

BILL IN EQUITY by Henry Beatty, a minority stockholder, against the North Western Transportation Company, and its directors, including James H. Beatty. The bill seeks to rescind the purchase by the corporation of the steamer *United Empire*. The defendants filed a statement of defence. The plaintiff joined issue, and the case was heard before BORD, Chancellor.

The material facts are as follows : —

The Transportation Company is a corporation, with a capital stock of \$300,000, divided into 600 shares of \$500 each. On January 1, 1883, James H. Beatty owned 200 shares, and was a director. He was then building a steamboat, to be called the *United Empire*; and desired to sell it to the company. In January, 1883, he purchased 101 additional shares. On the day of the annual meeting in February, 1883, he transferred 5 shares to Rose and 5 to Laird, whereby they became qualified to be directors; and they were then elected directors. The board was composed of five directors; and James H. Beatty, Rose, and Laird constituted a majority.

The board of directors, while James H. Beatty was present and acting, passed a vote (called a bye-law) to purchase the steamboat of James H. Beatty upon specified terms. The directors, at the same time, voted to submit the said bye-law to a special meeting of the stockholders. At such meeting, a vote to adopt the bye-law was carried by a vote of 306 to 289. Of the 306 affirmative votes, 291 were cast by James H. Beatty, and ten by his transferees, Rose and Laird.

The bill charges that the purchase was not entered into by James H. Beatty *et als.* on behalf of the company in good faith for the purpose of promoting the best interests of the company, but for the purpose of serving their private interests contrary to their duty to the company and its stockholders. Subsequently all charges of fraud and collusion were abandoned. It was proved by uncontradicted evidence, and was substantially admitted, that, at the date of the purchase, the acquisition of another steamer was essential to the efficient conduct of the company's business; that the *United Empire* was well adapted for that purpose; that it was not within the power of the company to acquire any other steamer equally well adapted for its business;

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and that the price agreed to be paid for the steamer was not excessive or unreasonable.

The case was heard in the Chancery Division, at Toronto, before BOYD, CHANCELLOR, who decreed that the purchase should be set aside. (6 Ontario, 300.)

The Court of Appeal of Ontario (HAGARTY, C. J., BURTON and OSLER, JJ.) unanimously reversed the decree of the Chancellor. (11 Ontario Appeal, 205.)

The Supreme Court of Canada (RITCHIE, C. J., FOURNIER, HENRY, TASCHEREAU, and GWYNNE, JJ.) unanimously reversed the last mentioned decision, and restored the decree of the Chancellor.

SIR W. J. RITCHIE, C. J. Though it may be quite true, as a general proposition, that a shareholder of a company, as such, may vote as he pleases, and for purposes of his own interest, on a question in which he is personally interested, does that proposition necessarily cover this case? Is it not abundantly clear that, whatever a simple stockholder may do, no director is entitled to vote, as a director, in respect to any contract in which he is personally interested? Directors cannot manage the affairs of the company for their own personal and private advantage; they cannot act for themselves and, at the same time, as the agents of the corporation whose interests are conflicting; they cannot be the sellers of property and the agents of the vendee; there must be no conflict between interest and duty; they cannot occupy a position which conflicts with the interests of the parties they represent and are bound to protect. Is it not somewhat of a mockery to say that this by-law and sale were invalid and bad, and not enforceable against the company as being contrary to the policy of the law by reason of a director entering into the contract for his personal benefit where his personal interests conflicted with the interests of those he was bound to protect, but that it can be set right by a meeting of the shareholders, by a resolution carried by the vote of the director himself against a large majority of the other shareholders? If this can be done, how has the conflict between self-interest and integrity ceased?

*Genl prop- shh can vote for his own m*  
*But dir. can't*  
*even as shh.*

While recognizing the general principle of non-interference with the powers of the company to manage its own affairs, this case seems to me to be peculiarly exceptional; a director, acting for the company, makes a sale, acting for himself, to the company, a transaction admittedly indefensible; this purchase is submitted to the shareholders and the director, having acquired a controlling number of votes for this purpose, secures a majority by his own votes thus obtained without which the purchase would not have been sustained, and confirms as a shareholder his invalid act as a director, and thus validates a transaction against which the policy of the law utterly sets its face.



It does seem to me that fair play and common sense alike dictate that if the transaction and act of the director are to be confirmed, it should be by the impartial, independent, and intelligent judgment of the disinterested shareholders, and not by the interested director himself, who should never have departed from his duty. If he had done his duty and refrained from acting in the transaction as a director the by-law might never have been passed, and the contract of sale never entered into; and having acted contrary to his duty to his co-shareholders he disqualified himself from taking part in the proceedings to confirm his own illegal act; and then to say that he was a legitimate party to confirm his own illegal act seems to me simply absurd, for nobody could doubt what the result in such a case would be, as the futility of the interested, but discontented, shareholders attempting to frustrate the designs of the interested director with his majority is too manifest; but he, if he had done his duty towards them and refrained from entering into the transaction, would never have been in the position of going through this farce of submitting this matter to the shareholders, and when so submitted of himself voting that he, though he had acted entirely illegally, had done right, and thereby binding all the other shareholders who thought the purchase undesirable; or in other words, by his vote carrying a resolution that the bargain he himself had made for the company as buyer, from himself as seller, was a desirable operation and should be confirmed.

I rest this case entirely on the position Beatty held as a director, and, the duty which pertained to that office. In that view, it is not necessary to discuss how far, or rather under what circumstances a shareholder may vote at a general meeting of shareholders on matters on which he is individually interested. I cannot, however, but look upon it as rather a bold and startling proposition that a shareholder should be able to offer a property for sale to the company from a bare majority of votes and by such vote, against the will of all the other shareholders, compel the company to become the purchaser at his own price and on his own terms, against the wish of all the other shareholders, who may, as in this case, be a minority of 289 votes against 306.

HENRY and GWINNE, JJ., delivered concurring opinions.

The case was then carried by appeal to the Judicial Committee of the Privy Council.

Sir *R. E. Webster*, Attorney General, and *Jeune*, for appellants, contended that the judgment of the Court of Appeal was correct, and that of the Supreme Court should be reversed. The fiduciary position of J. H. Beatty as director had, it was submitted, nothing to do with the question. His vote as shareholder at the general meeting was the thing in dispute, whether he was prevented from giving it on a matter in which he was personally interested. As for his voting for the bye-

Rule suggested  
vote as shareholder  
out

Suggests of a  
fiduciary duty  
a majority

law at the directors' meeting it had no other object or effect than that of bringing the matter before a general meeting. At the most it was voidable and not void, and the question was as to the validity of its ratification, and that depended upon the validity of the appellant's vote as a shareholder. There is no principle of equity why a shareholder should be disqualified from voting at a general meeting, or why his vote should be examined and disallowed, except for fraud. The disqualification of directors results from their agency. The shareholders are principals. In this case if the majority were interested in the vessel sold, the minority were interested in a competing line and had interests adverse to the company; and the validity of their votes might also on the respondent's contention be examined on the ground of personal interest. The motives of shareholders for their votes cannot be inquired into. If there is no fraud they are free to exercise their own judgment as they please, and that exercise cannot be called in question by other shareholders. Reference was made to *Pender v. Lushington*; <sup>1</sup> *M'Dougall v. Gardiner*; <sup>2</sup> *East Pant Du United Lead Mining Company v. Merryweather*; <sup>3</sup> *Mason v. Harris*.<sup>4</sup>

Sir Horace Davey, Q. C., and Bremner, for respondent.

[Argument omitted.]

SIR RICHARD BAGGALLAY.

The question involved is doubtless novel in its circumstances, and the decision important in its consequences; it would be very undesirable even to appear to relax the rules relating to dealings between trustees and their beneficiaries; on the other hand, great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders, voting in that character at general meetings, were to be examined, and their votes practically nullified, if they also stood in some fiduciary relation to the company. *Arg ab uncomm*

It is clear upon the authorities that the contract entered into by the directors on the 10th of February could not have been enforced against the company at the instance of the defendant J. H. Beatty, but it is equally clear that it was within the competency of the shareholders at the meeting of the 16th to adopt or reject it. In form and in terms they adopted it by a majority of votes, and the vote of the majority must prevail, unless the adoption was brought about by unfair or improper means.

The only unfairness or impropriety which, consistently with the admitted and established facts, could be suggested, arises out of the fact that the defendant J. H. Beatty possessed a voting power as a shareholder which enabled him, and those who thought with him, to adopt the bye-law, and thereby either to ratify and adopt a voidable contract, into which he, as a director, and his co-directors had entered, or to make a similar contract, which latter seems to have been

<sup>1</sup> 6 Ch. D. 73.

<sup>2</sup> 2 H. & M. 254.

<sup>3</sup> 1 Ch. D. 13.

<sup>4</sup> 11 Ch. D. 107.

what was intended to be done by the resolution passed on the 7th of February.

It may be quite right that, in such a case, the opposing minority should be able, in a suit like this, to challenge the transaction, and to shew that it is an improper one, and to be freed from the objection that a suit with such an object can only be maintained by the company itself.

But the constitution of the company enabled the defendant J. H. Beatty to acquire this voting power; there was no limit upon the number of shares which a shareholder might hold, and for every share so held he was entitled to a vote; the charter itself recognised the defendant as a holder of 200 shares, one-third of the aggregate number; he had a perfect right to acquire further shares, and to exercise his voting power in such a manner as to secure the election of directors whose views upon policy agreed with his own, and to support those views at any shareholders' meeting; the acquisition of the *United Empire* was a pure question of policy, as to which it might be expected that there would be differences of opinion, and upon which the voice of the majority ought to prevail; to reject the votes of the defendant upon the question of the adoption of the bye-law would be to give effect to the views of the minority, and to disregard those of the majority.

The judges of the Supreme Court appear to have regarded the exercise by the defendant J. H. Beatty of his voting power as of so oppressive a character as to invalidate the adoption of the bye-law; their Lordships are unable to adopt this view; in their opinion the defendant was acting within his rights in voting as he did, though they agree with the Chief Justice in the views expressed by him in the Court of Appeal, that the matter might have been conducted in a manner less likely to give rise to objection.

Their Lordships will humbly advise Her Majesty to allow the appeal; to discharge the order of the Supreme Court of Canada; and to dismiss the appeal to that Court with costs; the respondent must bear the costs of the present appeal.<sup>43</sup> 184, 186.

Freehold was  
in rem. Co.

(F) *To enjoin Any Act which the Corporation is unauthorized to do, or which it was unauthorized to do when Plaintiff became a Shareholder.*

**NATUSCH v. IRVING ET ALs.**

1824. *Gow on Partnership, Appendix No. VI. Page 398.<sup>1</sup>*

PLAINTIFF, on behalf of himself and all others the shareholders, members, or partners of the Alliance British and Foreign Life and Fire Assurance Company, filed this bill against the president and directors, praying, *inter alia*, for an injunction to restrain them from carrying on the business of marine insurance in the name or on the account of the company, and from applying the capital of the company to any such purpose. Of a member.  
a 3rd Co files  
but info is  
Pres pro & carry  
on M.D. bus.  
Montlake has  
to back

The case made by the bill and affidavits was, in part, as follows :

A prospectus was issued for the formation of an unincorporated company to grant fire and life insurance, with a capital of five million pounds divided into fifty thousand shares, plaintiff subscribed for fifteen shares, paid the required deposit, insured his life in the company and paid the insurance premium. He was willing also to execute a proper deed of settlement. After the plaintiff had subscribed, &c., the majority of the company undertook to carry on the additional business of marine insurance. They prepared a deed of settlement which contained provisions for enabling the company to carry on marine insurance ; and which plaintiff refused to execute. Plaintiff objected to the company's carrying on a marine insurance business. The directors informed plaintiff that, if he was dissatisfied with the course intended to be pursued, he might receive back his deposit with interest, and also have his life policy cancelled and the premium returned.

LORD ELDON, CHANCELLOR.

3. An offer is made to the plaintiff that he may receive back his deposit with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern ; and, in effect, merely by *compelling* them to retire upon such terms, so to form a *new company*. This would, as to partner-

<sup>1</sup> Statement abridged. Part of opinion omitted. The case was first reported in *Gow*, and has since been reported in 2 Cooper, *Tempore Cottenham*, 358. — Ed.

ships, be a most dangerous doctrine. Where a partnership is dissolved (even where it can be *in a sense* dissolved the instant after notice to dissolve is given, if there be no contract to the contrary), it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means and assets of the partnership existing at the time of the dissolution as beneficially as may be for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him, to whom they have given an offer of his deposit and interest, *Take that, and we are a new company*, keeping the effects, means, assets, and property of the old, as the property of the new partnership.

4. The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in.

5. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares.

If six persons joined in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power; because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent.

But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have *acquiesced* in such intention, and to have permitted the other partners to have entered upon and to have engaged themselves and the body in such new projects, and thereby to have placed their partners, so engaged, in difficulties and embarrassments, unless they were permitted to proceed in the farther execution of such projects, if a court of equity would not go the length of holding that such conduct was consent, it would scarcely think parties so conducting themselves entitled to the *festinum remedium* of injunction.

It may be taken that the principle that would apply to the partnership of six, will apply to this partnership of 600 or 700; 340 have exe-

cuted in respect of not quite half the number of shares: there probably may be therefore 600 or 700 members. To those who have not had occasion to observe the boldness of speculation, it may seem astonishing that persons, and so many in number, should have engaged themselves in a speculation so little explained, and undertaken to execute deeds, of the contents of which they had so little information. To those who know the difficulty of applying the rules of law and equity to societies constituted of such numbers of persons not incorporated, it is not matter of surprise that persons, ignorant of those difficulties, should become members of such societies; it may be matter of surprise to them that persons who know the difficulty of applying those rules should become members, even where the nature of the speculation is clearly explained, and full information is given of the contents of the deeds to be executed. Much has been done with respect to the difficulty alluded to, by provisions how those who have demands upon such societies are to sue, and how such societies are to be sued; much remains to be done, and particularly as to rendering simple and effectual the remedies of the members of such societies against each other. It is observed that the members of this society *underwriting* will be each liable to the bankrupt laws. That depends upon the act of parliament which is to take effect in *May* next.<sup>1</sup> Shares may devolve to feme covert, infants, &c.; but whatever are the difficulties, courts must struggle to remedy them, and to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, empowered, or acquiesced in expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a court would act upon in the case of a partnership of six must, as far as the nature of things will admit, be applied to a partnership of 600.

*The injunction was granted.* of 182

<sup>1</sup> 5 Geo. 4, c. 98, s. 2, by which an underwriter is declared to be a trader liable to the bankrupt laws, and see 6 Geo. 4, c. 16, s. 2. Formerly it was held that an underwriter, merely in that character, could not be a bankrupt. *Ex parte Bell*, 15 Vesey 355.

Co Code 362. Any incorp may amend its articles by a majority vote or by a vote or written assent of all its representatives at least 2/3 of subscribed C's. & such corp or committee may if no C's.

## 140 STEVENS v. RUTLAND &amp; BURLINGTON R. R. CO.

1851. 29 Vermont, 545.

At the time the orator became a shareholder, the defendant was authorized to run a railroad between specified points. Thereafter the legislature authorized an extension, and this act was accepted by the directors and a majority of the shareholders. The orator sought to restrain the use of the corporate funds or credit in constructing such extension.

BENNETT, CHANCELLOR. The question is, can the orator, upon such a state of facts, claim, at the hands of the chancellor, his injunction.

It is an admitted principle, that in partnerships, and joint stock associations, they cannot by a vote of the majority change or alter their fundamental articles of copartnership or association, against the will of the minority, however small, unless there is an express or implied provision in the articles themselves that they may do it. It is equally well settled, that a court of chancery will, upon the application of an individual member of a partnership, or joint stock association, restrain, by injunction, the majority from using the funds or pledging the credit of the partnership or association in a business not warranted, and not within the scope of their fundamental articles of agreement. Courts of equity treat such proceedings by a majority, as a fraud upon the other members, which they will neither sanction or permit. To prevent the commission of fraud, by injunction, has been one of the earliest and most appropriate heads of equity jurisdiction, as well as to relieve against it, when committed.

It was well conceded, in the argument on the defense, that if the corporation had been about to proceed to a construction of the contemplated extension without the act of 1850, it would have been a proper case for an injunction. The only question which can be open to debate is, as to what shall be the effect of the act of 1850, and a subsequent adoption of the act by the corporation, upon the individual rights of a shareholder who does not assent to its adoption? If bound by it, there is no equity in this bill. It is, and must be admitted, that the legislature has no constitutional power, unless it be reserved in the grant, to change or alter an act of incorporation without consent, and thereby cast upon the company new and additional obligations, or take from them rights guaranteed under the original charter. And indeed this the legislature have not attempted to do. It is also equally true that it is a part of the law of corporations, that they act according to the voice of the majority. But it is to be remembered, that this is not a suit in which the plaintiff seeks to protect himself in any corporate right, but in his own individual right, growing out of the fact of his having become a corporator by his subscription and its payment, to the

Leg. authy. an  
extension? Act of 1850  
my instr. by P

Can he get my injunction?

capital stock of the company. One of an aggregate corporation may contract with the company, as well as a third person; and the rights of the individual so contracting are no more distinct and independent in the one case than in the other. The plaintiff, by his subscription, assumed to pay to the corporation, and only for the purpose specified in the charter, its amount, according to the assessments; and there was at the same time a trust created, and an implied assumption on the part of the corporation, to apply it to that object, and none other. The corporation also assumed upon themselves to account to this corporator for his share of the dividends, when this road should be completed and put in operation, and for his share of capital stock, though not *in numero*. The charter, in this case, gives to the state the right to purchase out the road of the corporation, after a given number of years, upon certain terms therein specified. The relation between each original shareholder and the corporation is the same. The obligation of the contract between the legislature and the corporation, after an acceptance of the charter, is no more sacred than that which is created between the corporation and the individual corporator. Does any one suppose the legislature could, without the consent of parties, absolve a corporator from liability on his subscription to the corporation, or modify it? and can they do the reverse of it?

It is conceded that there is a class of alterations in a charter, which the corporation may obtain and adopt, that would not so essentially change the contract as to absolve the corporator from his subscription, or give him a right to complain in a court of justice, in case he had previously paid it. Where the object of the modification or alteration of the charter is auxiliary to the original object of it, and designed to enable the corporation to carry into execution the very purpose of the original grant, with more facility and more beneficially than they otherwise could, the original corporator cannot complain; and I should apprehend it would make no difference with the rights of a corporation, in such a case, though he could show that the charter, as amended, was less beneficial to the corporators than the original one would have been. The ground upon which such amendments bind the corporator, I deem to be his own consent. When he becomes a corporator by his signing for a portion of the capital stock, he in effect agrees to the by-laws, rules, and votes of the company, and there is an implied assent, on his part, with the corporation, that they may apply for, and adopt such amendments as are within the scope, and designed to promote the execution of the original purpose; and he signs, and the corporation receive his subscription, subject to such implied contingency; and if we regard it in the nature of a license, only, it would not alter the principle. Both parties having acted upon it, it would not be countermandable.

*what alter  
also may be  
made.*

But suppose the object of the alteration is a fundamental change in the original purpose, and designed to superadd to it something which is beyond and aside of it; does the same principle apply? [After citing and commenting on various cases, the last of which is Hartford



& N. H. R. Co. v. Croswell, 5 Hill, 385, the learned Chancellor proceeds:] Chief Justice NELSON, in his opinion, lays down this general proposition, "that corporations can exercise no power over the corporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent."

This is a sound proposition. The consent or assent may, however, be implied in a class of cases, as has already been stated, where the amendment is not regarded as fundamental, and can be brought within the scope of the original purpose of the association; and this is going to the very verge of the powers of the corporation. It is difficult, and would be unwise, to attempt to lay down any general rules to determine in what precise cases the assent of the corporator should be implied, and in what not. It is sufficient for the present purpose to say, that his assent cannot be implied, in a case like the present, from a majority vote. Courts may differ, and doubtless will, in regard to what alterations shall be sufficient to constitute a fundamental change. But in the present case, I think, on this point there can be but one opinion. The termini of the road, as fixed by the charter, are Burlington, and some point on the west bank of Connecticut River, in the county of Windsor or Windham. The capital stock is one million of dollars, with a right in the corporation to increase it to an amount sufficient to complete said road, and furnish the necessary apparatus for conveyance. The supplementary act of 1850 purports to authorize the corporation, within three years, to construct and extend their railroad from the terminus in Burlington, to some point in Swanton, in the county of Franklin, a distance of about thirty miles; and the act provides that in the construction of the road, they shall have all the rights and privileges, and be subject to all the liabilities, contained in their original charter, and the acts in addition to it.

The franchise granted to this company was territorial; and an extension of the termini necessarily is an extension of the franchise. It cannot remain the same thing in substance, until it can be established that a part is equal to the whole. Besides, the company may increase the capital stock to such additional sum as shall be necessary to construct the extension.

The statute of 1850 is little less in effect, if anything, than an attempt to create in a summary manner, and by the way of reference, a new corporation, and to transfer all the old corporators to it. If all the corporators had assented to this transfer, it was well enough. The change in the purpose was not more fundamental in the case from the 5th of Hill than in this. It is not necessary that the business should be changed in kind, to change the original purpose. If this is not a change in purpose, it would not be to extend the road in one direction to Canada line, and in the other to Massachusetts line; and there would be no limits to the control which the corporation might acquire over the individual corporators, and this, too, without their consent, except what arises from the confines of legislative authority.

The change, then, in the charter being fundamental and the corporation not being able to bind the plaintiff by a majority vote, what must be the result? If he had been sued for an assessment upon his stock, he might have claimed that he was absolved from all liability upon the acceptance of the amendment. And is not this reasonable? Shall it be said that the legislature and the corporation have power to embark this corporator in a speculation to which he has never consented? If it can be done in one case it can in another. But having paid his funds into the corporation, he has a right in chancery to compel a faithful performance of the trust by the corporation, in conformity to the original charter, and to keep them within its purview. No one can suppose that upon the payment of his subscription, the personal identity of the plaintiff was merged in the corporation, or that he ceased to have distinct and independent rights. In *Rex v. Eastern Counties Railway Company*, 1 Eng. Railway Cases 509, the King's Bench issued a mandamus, upon the application of a minority, against the company, directing them to proceed in the construction of a railroad which had been chartered between two points, the corporation having stopped short of one of the termini, and voted to go no further.

In the case before us, it must follow, if the plaintiff is not bound by the conjoined effect of the act of 1850, and a majority vote of the corporation, the defendants can stand on no better ground, than a voluntary association, who are about to go beyond and aside of their original articles, against the will of a minority. This, in effect, was conceded in the argument. There was nothing improper in the passage of the act of 1850, though upon the application of a portion of the directors of the company, as stated in the bill. No attempt is made by the legislature to impair the obligation of any contract between themselves and the corporation, or to cast upon the company any new and additional burthens without their consent. There was no attempt to impair any contract arising under the prior charter, between the corporation and the corporator as an individual, or disturb any vested right in either. The act is not mandatory; and there is, in fact, an implied condition annexed to it, that it is to be accepted by all whose individual and corporate interests are to be affected by it, before it shall become operative. But suppose this act had been mandatory upon the corporation and the several stockholders, to build this extension in the road within three years; would not all cry out against its palpable injustice? Suppose, instead of this, the legislature had left it optional with the corporation to accept or reject the act of 1850, and had provided, that in case of the acceptance of the amendment by the corporation, it should bind the corporators who dissented from it, or did not assent to it, and this too, in their individual rights; would there not be the same reason to cry out against it? Would it not, by its carrying a stockholder into an enterprise which he had never consented to, and changing the principles of liability between the corporation and the individual corporator from what they were under the original compact,

impair and disturb vested rights under it? I have no hesitation in saying, that, in my opinion, it would be beyond the pale of the constitutional authority of the legislature.

In *Ellis v. Marshall*, 2 Mass. 269, it was held that no man could be made, by act of legislation, a member of an aggregate corporation without his personal consent; and the same principle would seem to apply when he is asked to remain and become a corporator under a supplementary act, to be attached to and become a part of the charter, where that which it is proposed to superadd is vital, and constitutes a fundamental change in the charter, which is but the constitution of the company.

[The learned Chancellor here discussed various authorities, including *Ware v. Grand Junction Water Co.*, 2 Russell and Mylne, 461. In reference to this case, he said (*inter alia*):

"I apprehend, that the views expressed by the Lord Chancellor in that case, if sound, must rest upon one of two grounds; either that the change asked for in the charter was not a fundamental one, or else upon the ground of the transcendent powers of a British parliament. . . . It is evident that Lord BROUGHAM . . . grounds himself upon the sovereign and uncontrollable powers of the parliament. . . . But with us, no legislature can transcend the bounds of the constitution."]

The Rutland and Burlington Railroad Company is but a private corporation, so far as the stockholders are concerned; though as it regards the powers of the legislature to authorize the taking of private property for public use, it may be said to be a *qua* public corporation. The stock is owned by individuals who compose the corporation, and from which they design to derive a profit; and they manage the business in view to their own interest; and it does not become a public corporation because the public interests may be incidentally promoted by it. In principle it is like a turnpike, a canal, or bridge charter; *Ten Eyck v. Delaware and Raritan Canal Company*, 3 Harr. (N. J.) 200. I think it is obvious beyond a reasonable doubt, upon principle and authority, that the plaintiff is not bound in his individual rights as a corporator, by force of the act of 1850 and the majority vote of the corporation, without his individual assent. In the case of public corporations, as in towns, counties, &c., a different rule may obtain. The distinction between private and public associations and corporations has been well settled since the days of Lord Coke. (Coke Little. 181, b.)

In case of public associations and corporations the public good requires that the voice of the majority should govern, and hence the power is more favorably expounded than when created for private purposes; and it would seem that public convenience required the adoption of such a rule. But in case of private associations and corporations it is not the doctrine that a majority can bind the minority in a matter beyond and aside of their original articles of association,

or charter of incorporation, unless it be by special agreement giving such power, which must be a part of the original association.

If, in a case like the present, the majority cannot bind the minority, it is plain that there is an equity in this bill, and that the defendants can stand in no better situation than if they had, by a vote of the company, proceeded to build the extension, and to apply the funds and credit of the corporation to that purpose, without any additional act of the legislature.

This doctrine of Lord Chancellor ELDON [in *Natusch v. Irving*] necessarily grows out of the doctrine that it is the business of courts of justice to enforce the contracts of parties, not to make them. To give to courts not only the power to enforce, but also the power to make, or even modify in one iota a contract fairly made, would be the rankest despotism.

The ground assumed is, that this corporation had the funds of the original stockholders for an object distinctly defined in the original charter, and that they cannot be allowed to apply them to any other purpose whatever, without the consent of the stockholders, and that to do it would be a breach of trust.

In regard to the expediency of bringing this bill, the chancellor cannot, and has no right to judge. The orator has the constitutional and sole right of determining this matter; and if he thinks it expedient, we must acquiesce in it; and no plea of the public good or inequality of interests involved can justify the chancellor in denying to the orator a right which is clearly accorded to him by well established chancery principles. The public good is best promoted by an impartial administration of justice according to the right of the case; and courts cannot measure the equality or inequality of interests in the litigant parties and make that a basis for a decision, notwithstanding what has been urged in the argument.

Where it is clearly shown that a corporation is about to exceed its powers, and to apply their funds or credit to some object beyond their authority, it would, if the purpose of the corporation was carried out, constitute a breach of trust; and a court of equity cannot refuse to give relief by injunction. See *Agar v. The Regent's Canal Company*, Cooper's Eq. 77; *The River Dun Navigation Company v. North Midland Railway Company*, 1 Eng. Railway Cases 153-4.

It cannot justify the chancellor in refusing to exercise the jurisdiction of chancery because the defendants may claim the right to proceed under color of the act of 1850. It is a settled principle that the circumstance of the defendant's acting under color of law, simply, can form no justification. The question, after all, will be: does the law justify the act which is being done, or threatened to be done? *Osborn v. The Bank of the United States*, 9 Wheaton, 738. If a law is unconstitutional it can give no authority. If the power it confers is abused or exceeded, the person acting under the color of law is a

wrong doer. In the case at bar the corporation had no power to build the extension under their original charter; and the act of 1850 is not binding upon the orator without his consent.

The injunction must therefore be allowed, but only so far as to restrain the defendants until the further order of the chancellor from applying the present funds of the corporation, or their income from the present road, either directly or indirectly to the purpose of building said extension in said road, or to pay land damages and other expenses which may be contingent upon the building of it; and also from using or pledging, directly or indirectly, the credit of the corporation in effecting the object of the extension; and at the same time the company will be left at liberty to build the extension with any new funds which they may see fit to obtain for that specific object.

Though this is but an interlocutory decree, made upon the plaintiff's equitable rights as disclosed in the bill, still it having been twice argued, and it being a case of considerable interest and importance, I have deemed it proper to publish, somewhat at length, the grounds of my opinion. "To err is human;" and if, upon more mature consideration, the conclusion of my own mind shall be found to be unsound, and not in accordance with principle and authority, I rejoice that they may be corrected by a superior tribunal.

After the above decision was announced, and before the injunction was issued, the defendants proposed to file bonds to indemnify the plaintiff against all damages which he might sustain by reason of the extension; upon which the chancellor suggested, that he did not deem it competent for him to make contracts for the parties; and that upon the authority of the case of *Natusch v. Irving et al.*, it could make no difference, if filed, in the result.

Code

# NORTHERN TRUST CO. v. SNYDER.

*U.V. trans: Revealed. Snyder allowed no appeal to Ariz  
1902. 112 Wisconsin, 516. (Here the debt were implicated?)*

*Power to enforce court  
to pay & sheriff bills  
& also to compel sheriff  
to act for costs  
& fee here*

MARSHALL, J. The ground upon which a member of a corporation is permitted to invoke the jurisdiction of equity to enforce a cause of action in favor of the latter is that he has an interest in the corporate affairs needing protection, which cannot be protected otherwise than by an enforcement of the cause of action of the corporation, and that such enforcement cannot be had, and justice will entirely fail, if he is not permitted to stand for those persons having the primary right to act. In order that the situation in that regard may be complete to the satisfaction of equity, it is necessary to show that such persons will not perform their duty. That may be done in either of two ways: By showing that they have neglected or refused to proceed after being requested so to do by some person or persons whose requests in that

regard should be honored; or by showing, expressly or by necessary inference, that they are so concerned in the wrong to be redressed, and hostile to any vindication or attempt to vindicate the corporate rights, that it is reasonably certain that a request to them to proceed to that end by judicial remedies would be unavailing. Observations may be found in some legal opinions tending to convey the idea that a demand upon the proper corporate officers to enforce a corporate right of action, and their refusal so to do, regardless of circumstances, is a condition precedent to the right of a member of a corporation to stand in their place and do their duty. Such is not the law. If it appears, reasonably, by all the allegations of the complaint, in a suit instituted by a member of a corporation in its right, that those persons in whom the duty and the primary right rests to represent it will not perform that duty, from any cause, a case is thereby presented, subject to proof, entitling an interested person, such as a taxpayer in case of a municipal or political corporation, to protect his right and that of all others similarly situated, by suing in his and their behalf, and presenting to a court for adjudication the cause of action of the corporation. *Doud v. W., P. & S. R. Co.*, 65 Wis. 108; *Franey v. Warner*, 96 Wis. 222; *Cunningham v. Wechselberg*, 105 Wis. 359; *Land, L. & L. Co. v. McIntyre*, 100 Wis. 245; *Egaard v. Dahlke*, 109 Wis. 366. The complaint in this case, and the proofs as well, fully satisfy that test. It is alleged and proved that the county board of Douglas County, for a long period of time prior to the commencement of this action, had been accustomed to audit and order paid, sheriff's bills for large amounts, covering almost all branches of his official labor, that were not legally chargeable against the county; that their practice in that regard, and to a considerable extent that of their predecessors in office, had been approved by their legal adviser, and that they believed the same to be legal. Any attempt to recover back money illegally paid, therefore, upon his illegal claims, or to prevent such payment, involved a charge against the members of the board of having wrongfully, either through ignorance or something worse, caused the county revenues to be dissipated. The case made shows that if the sheriff be guilty of obtaining money on illegal bills, the members of the board are guilty participants in the wrong. That they would turn against themselves, impeaching their own transactions, confessing that they had misused their positions and squandered the revenues of the county to the amount of many thousands of dollars, even though they were not guilty of any bad faith in the matter, would have been an exhibition of moral heroism in office not reasonably to be expected. Therefore, there were but two courses for taxpayers to pursue: Submit to the wrong, or invoke the aid of the court in this form of action for redress.

The rule above discussed is not deemed controlling, necessarily, in this case, for the following reason: It applies only when the primary right involved is the right of the corporation, which it might and ought to enforce. It does not concern the action of a member of a

corporation to protect his own interests which are of a primary nature. The distinction must not be lost sight of, between where the right of a member of a corporation is primary, such as that to prevent the unlawful expenditure of corporate funds, and where it is secondary, as that to recover for the benefit of the corporation, money unlawfully expended. Every member of the corporate body, in the first situation suggested, is primarily interested in having the corporate officers prevented from transcending their powers or violating the organic act of the corporate body in any way. Pomeroy, Eq. Jur. § 1093. There is obviously no way of enforcing that right except by a resort to equity, and its doors are always open to any proper case of that kind. The relief sought in such cases is preventative, but any other relief is obtainable which may be necessary, in the given case, to do complete justice in the matter. To that end relief may be given which is appropriate to a state of facts which, of themselves, would be a proper subject for an independent suit by the corporation, or suit in its right by a member thereof, if such facts can be reasonably considered so far germane to the main cause of action as to be deemed a part of it. Pomeroy, Eq. Jur. § 1093. Such is the situation here. The main cause of action was to put an end to a course of allowing illegal sheriff's charges that had been in vogue in Douglas County for a long time, and to enjoin the county from paying a large amount of such charges that had been allowed and were about to be discharged by the issuance of county orders and the payment thereof. That necessarily brought before the court the transactions in regard to the actual disbursement of money upon illegal bills, to the end that any legitimate indebtedness, found due on unpaid bills, might be discharged in whole or in part by money already received by the sheriff, to which he was not entitled, and, incidentally, to restore to the county treasury any excess of money illegally paid to him, over and above the legal part of such unpaid bills. All of the matters brought to the attention of the court were either directly or indirectly involved in the cause of action for preventative relief. That rendered unnecessary any showing of compliance with the rule first discussed as a condition precedent to the maintenance of the suit. 289.

(note) 1-3724 515- Eq. will prevent appl<sup>ts</sup> corp. funds to N.T. purp<sup>s</sup> & will relieve as it if committed at such. dissenting shh.

*Dr. H. Nelson*

A. H. may directly upon underlying, a U. v. act. 35 Ch B 675. D. v. m.  
But on the seeks to set aside aux? U. v. Hans? he must move there corp: 535 J  
Case may arise involving both rights & that either form. actn is approp. 79 3 52.

HUTTON v. JOSEPH BANCROFT & SONS CO.

1897. 83 Fed. 17.

DALLAS, Circuit Judge. This is a suit in equity, brought by a shareholder of the Bancroft Company against that corporation and Victor G. Bloede. Its objects are to compel Bloede to surrender to the Bancroft Company, for cancellation, certain shares of its stock, and to repay to that company money which he has received as dividends on that stock, and also to prevent any further payments to him of dividends now or hereafter declared. The relief thus sought is claimed upon the grounds: First, that Bloede obtained the shares in question from the Bancroft Company by means of false and fraudulent representations made by him to its officers; and, second, that the agreement to exchange shares of the stock of the Bancroft Company for a like number of shares of the Victor G. Bloede Company, in pursuance and consummation of which the Bancroft Company issued its shares to Bloede, was not authorized by the charter of the Bancroft Company, and was in violation of the statutes of Delaware, and of the rights of the complainant as a stockholder of the Bancroft Company. It is not alleged that any application had been made to the corporation, or to its officers or managing body, to remedy the alleged wrong, or to institute suit to that end; and inasmuch as, for this reason solely, the demurrer of the defendant Bloede must, in my opinion, be sustained, no other question will be considered. It is not requisite to determine whether or not the ninety-fourth equity rule is applicable to this case, for my judgment is based upon the general principle, which, quite independently of that rule, is well settled, that a stockholder who conceives that his rights, as such, have been invaded or are imperiled either by an act done or threatened by the corporation, or by any transaction of a third party with it, must, before he can himself successfully invoke the aid of a court of justice, seek redress within the corporation of which he is a member, or properly endeavor to obtain suit to be brought in its name and on its behalf. *Dunphy v. Association*, 146 Mass. 495, 16 N. E. 426; *Holton v. Railway Co.*, 138 Pa. St. 111, 20 Atl. 937; *Holton v. Wallace*, 23 C. C. A. 71, 77 Fed. 61; *Hawes v. Oakland*, 104 U. S. 450. The prayers for cancellation of stock issued to Bloede, and for the repayment by him of the dividends heretofore paid thereon, manifestly and necessarily concede that the alleged rights upon which they are founded are, if existent, rights of the corporation. What is asked is that the delivery of the shares and repayment of dividends shall be required to be made to the Bancroft Company, and, of course, if there be a right to have either of these things done, it must be because that company, not a shareholder, is entitled to the delivery and repayment demanded. I cannot agree with counsel of complainant that, because the dealing of the corporation with Bloede

But by John W. Co  
+ J. H. Campbell  
to surrender  
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is charged to have been *ultra vires*, this bill may be maintained without previous effort having been made to induce action by the corporation. The question is not as to the right of a member of a corporation to redress for unlawful acts of any character which affect him injuriously. The allegation either of deceit committed by Bloede or of illegal action on the part of the corporation may, it is assumed, without deciding, give this plaintiff title to relief, yet the condition none the less exists that he should have sought to move the corporation to action before appealing to the court himself.

The prayer for an injunction to restrain the Bancroft Company from paying any further dividends to Bloede cannot avail to sustain this bill. There is no allegation whatever of any actual disagreement between that corporation and this complainant, and the only averment in supposed support of this particular prayer is "that other dividends will be declared on said shares of stock, which, together with said unpaid dividends, will be paid." How it is known, or why it is believed, that such payments "will be" made is not even suggested, and it cannot be doubted that, if the corporation or its officers had been requested not to make them, and had refused compliance with that request, those facts would have been distinctly stated. In *Cook, Stock, Stockh. & Corp. Law*, § 297, cited for the complainant, it is said, it is true, that "a court of equity will, upon a proper application, grant an injunction to prevent the transfer of illegally issued stock, or the payment of dividends thereon"; but the author proceeds to define what he means by "a proper application" by adding, in accordance with the authorities, that "a suit to that end may be commenced either by the corporation, or by the stockholders themselves in their own behalf, where the corporation fails or refuses to institute it." It may well be questioned whether the bald assertion that an act will be done by another, unaccompanied by the disclosure of any circumstance to give it weight or credence, should be regarded as a fact well pleaded, and therefore to be, in general, taken as true upon demurrer. Aside from this, however, the court, I think, is not precluded, even on demurrer, from looking to its own record in the cause for any aid which it may lend for the ascertainment of the actual verity of an allegation so unsatisfactorily made as that under consideration (*Railroad Co. v. Groeck*, 68 Fed. 609-612); and the record in this instance makes it apparent that there is absolutely no ground whatever for apprehending that any further payments of any kind will be voluntarily made by the Bancroft Company to Bloede. As was said by Judge Wales, in disposing of the complainant's motion to remand, it appears from the answer of the Bancroft Company, which was filed before this demurrer was interposed, that there is "no matter of dispute, or any controversy, between the complainant and the defendant Joseph Bancroft & Sons Company. On the contrary, it is apparent that their interests in the outcome of the present suit are really the same, and that they are both seeking the same objects, to wit, the return and cancellation

of the stock of the Bancroft & Sons Company which has been issued to Bloede, the repayment of the money paid to him for dividends thereon, and an injunction to prevent the payments of any further dividends on that stock." To uphold this bill at this stage merely because it alleges that a certain thing will be done in the future, without stating the grounds of that obviously inferential allegation, and despite the record evidence in disproof of it, would be but to invite persistence in a course of procedure which can lead to nothing but misdirected effort and the unprofitable expenditure of time and money. It is evident now that the Bancroft Company should have been the plaintiff in this suit, and it is, therefore, I think, the duty of the court to decide now — as ultimately it would be compelled to do — that, as the suit of a shareholder, it cannot be maintained. The demurrer is allowed, with leave to the complainant to file any motion which he may be advised to make under rule 35 or otherwise, on or before November 1, 1897; and after date either party may apply for further orders not inconsistent with the foregoing opinion. D 189, 204 . . .

*On my disprae. corps prop us fr. men the fact that minor case maintain a suit at law & v. their stock is no bar to their suit us eq. to avoid & C. trans. but they have option to avoid & trans. & follow trust prop us equity or to affirm it & recover as at law & v. their stock. 144 F. 765.*

*On actn. a corp us making a trf. all its prop was illegal & its s. recomb. & C. who made such trf. a oth may maintain a suit on b/c corp to set as. acc. 98 N. 672*

*Ca. Corp have this x'd trans. set aside itself?*

corp: have interest in prop. subject to charter limit 87/642; 30/166  
 Law corp can dispose of prop by under contract shd' on non terms 81/875 (189)  
 But even so it can't maintain its corp life from 132 & 72/104,  
 a proper corp can sell its entire prop to engage in a new enterprise, for  
 532 PHILLIPS v. PROVIDENCE STEAM ENGINE CO.  
 purp of speculation or when no reasons exp'd require sale. 550. 229-32 Mont. '91  
 But if in opinion, a my. rule, shd' as a whole require that officers corp  
 be wound up, a my. may authz sale, entire assets for apcnuz consid as a  
 dept towards liquid. 42 & 276 (1891). 21 & 515 (1911)  
 also a my. cause a necessary disposal, all prop. a long corp long but a market  
 The debt do n have his unpledged. his order. an unadv. corp. have to mark  
 an asst. or benefit. cr? cf. 140 N.Y. 63 (1894).

(c) To prevent the Sale, or Lease, of all the Corporate Assets.

# PHILLIPS v. PROVIDENCE STEAM ENGINE CO.

1899. 21 Rhode Island, 302.

BILL IN EQUITY to restrain a sale of the property of a corporation, ordered by a vote of the majority of the stockholders, brought by a minority stockholder. The facts are stated in the opinion. Heard on bill, answer, and replication. Bill dismissed.

STINESS, J. The complainant, a stockholder, seeks to restrain the respondent corporation from disposing of its property. The company is doing business under an extension by its creditors, in the terms of which an installment becomes due in November next. It is agreed that this cannot be met, and that the company will be unable to go on in business because the creditors refuse a further extension. In view of these facts, an arrangement has been made to form a new company, in which creditors holding extension notes will take preferred stock to the extent of one-half of their claims, while other subscribers will furnish enough cash to pay for the plant and provide a working capital. The terms of the proposed sale give to the present stockholders \$70,000 over and above the indebtedness of the company, amounting to about \$228,000, making a total payment of about \$298,000. The estimates of the value of the property vary from \$327,000 to \$397,000, the latter being the complainant's estimate; but it does not appear that either party has reason to expect that either sum would be realized at a forced sale. This is not a sale in which the other stockholders are to gain any advantage beyond the privilege, which is also offered to the complainant, of taking his proportionate amount of cash or its equivalent stock in the new company, as he may prefer.

It is in effect a cash sale to strangers, approved by stockholders representing 3,675 shares against 75 held by the complainant. While this majority cannot affect any rights to which he is entitled, it tends to show a fair price. It is a well-known result, to which courts of justice cannot be blind, that large plants of this kind are often, if not

unable to form  
 a new corp. with  
 out an option

usually, sold at a great sacrifice in case of a forced sale. We should not have to go outside of the records of our own court to find proof of this fact. A sale being necessary, the question is how shall it be made. The prayer of the bill is that a receiver may be appointed; that the business may be wound up and the company dissolved; and the argument is that the sale of the effects should be at public auction.

The question, then, is whether the complainant is entitled to such a decree.

There is a difference of opinion as to the power of a corporation to sell its entire property and thus practically to retire from business. Some courts hold that it may be done by the consent of all the stockholders (Am. & Eng. Ency. L. 2 ed. vol. 7, p. 734, note 1), and others hold that it may be done by a majority. *Ditto*, notes 2, 3, and 4. All of the authorities cited in note 1, however, do not hold that the consent of all the stockholders is necessary, *e. g.* *Treadwell v. Salisbury*, 7 Gray, 393; *Wilson v. Miers*, 100 Eng. Com. Law, 248, *et al.* But the editor adds: "There seems to be no doubt that it may do so when it is no longer able to profitably continue its business."

We think that this is the correct rule. It has been recognized in this State. *Hodges v. N. E. Screw Co.*, 1 R. I. 312, 350. In *Wilson v. Prop'rs Central Bridge*, 9 R. I. 590, Brayton, C. J., said: "No case has been cited, and, in view of the diligence of counsel in this case, we may say there is no case which holds that where the purpose of the incorporation could not be accomplished, the business contemplated could not be carried on; where the capital had been exhausted in endeavors to go on, having no means to go further; a company thus laboring under burdens which they could no longer bear, could not release themselves by a surrender of their franchise to the State which granted and which was willing to receive it, and that by a majority. This is not only for their benefit, but it is a necessity, and it would be hard indeed if one stockholder could by his dissent prevent such relief against the prayer of all other members of the company." In *Peabody v. Westerly Water Works*, 20 R. I. 176, a necessary limitation to this rule was recognized in the words: "The action of the company was taken by a vote of more than 1,100 out of a total of 1,350 shares. There is no proof of unfairness, oppression, or fraud in such action. The case as presented is simply that of a stockholder who differs from a large majority of his fellow stockholders as to the expediency of a sale."

The principle upon which these cases rest is that a corporation may dispose of its property by a majority vote, in cases which are free from unfairness, oppression, and fraud. Against wrongs of this kind equity will interfere. To this effect are *Lauman v. Lebanon R. R.*, 30 Pa. St. 42; *Treadwell v. Salisbury*, 7 Gray, 393; *Leathers v. Janney*, 41 La. Ann. 1120; *Sewell v. East Cape May Co.*, 50 N. J. Eq. 717; *Sargent v. Webster*, 13 Met. 497; *Warfield v. Marshall*, 72 Ia. 666; *Wilson v. Miers*, 100 Eng. Com. Law, 348; see also *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543.

Rule My can  
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of stock case

The complainant does not charge improper conduct, but simply that he considers the price inadequate and unjust; and hence he prays for a receiver and a sale of the property by auction. Ordinarily when a court orders a sale it can only be done by auction. A court cannot negotiate a private sale, and it orders an auction as the fairest chance for all parties to bid and buy. But when the parties in interest have negotiated a sale which is fair to all concerned, and there is nothing to show that a larger price may reasonably be expected, it does not follow that an auction sale would be ordered. This question was considered in *Quidnick Co. v. Chafee*, 13 R. I. 402, in which the trustee had an offer for the entire property, approved by nearly all the creditors. Then other parties intervened, agreeing to bid the amount named at auction, and the court ordered a sale by auction. In the present case there is no evidence that anybody is willing to give as much as the offer proposed, or that there is any reason to suppose that it will bring as much or more. The only testimony put in by the complainant is that the tools will probably bring more than they are valued at by the company, while as to the bulk of the property, the real estate, &c., there is no evidence of market value. Moreover, the complainant does not show that he desires to bid upon the property himself, or that he knows of any one who would bid at a sale. In this absence of evidence that a larger total might be expected from an auction sale we see no reason to disturb the agreement already made, which, upon the testimony given, seems to be fair.

The complainant relies strongly on *Mason v. Pewabic Co.*, 133 U. S. 50. In that case the court had appointed a master to value the property, which he reported to be nearly \$500,000. A majority of the company had arranged a sale to themselves at \$50,000. Naturally, in view of such gross inadequacy, the court ordered a sale by auction. The case was very different in its details from the case before us.

In *Wilson v. Prop'rs Central Bridge*, 9 R. I. 590, the city of Providence had control of the corporation and had sold the corporate property to itself. The court restrained the city from taking possession and ordered a sale by auction. That, too, was a different case from this one.

The court is bound to look to the interests of all parties, and especially to protect the rights of a minority from oppression and fraud. But where, as in this case, no such thing is charged, and nothing is shown to lead to the belief of a better total price, the complainant makes no case for interference. To show that movable tools may be sold at a price somewhat, but not largely, higher than that at which they are scheduled, is quite a different thing from showing that the plant as a whole would sell for more than the price offered. To set aside the sale under these circumstances would be to risk a certainty for an uncertainty, without any testimony on which to base a hope of benefit to the stockholders from such interference. We see no reason for such a step in the dark.

*Bill dismissed.*

*A sale, unless for corp. - a corp for corp but selling outside obligs requires unanimous consent  
 an exchange corp. assets for corp but selling outside obligs requires unanimous consent  
 The my must exercise their p to run corp. e regard to corp. which was created & not min  
 of ye a windup each has a right to his distrib. share as determined by sale of prop.  
 ELYTON LAND CO. v. DOWDELL 541  
 it can stand on C. Assoc<sup>n</sup> as made req. will for a remedy 133 US 50 (1890)*

*- Exchange rather than sale*  
 144 ELYTON LAND CO. v. DOWDELL, 1896. 118 Alabama, 177.1 *Ans* {Has corp p to acq stock in 2<sup>d</sup>  
 {Has my p to authy corp.

BILL in equity filed by Annie Dowdell, the owner of five shares in the Elyton Land Company, for the purpose of annulling a conveyance of its property by that corporation to the Elyton Company, and also of annulling a mortgage executed by the latter company to secure certain bonds.

Some years before the conveyance the Elyton Land Company having on hand, as profits, a large amount of notes, had issued dividend certificates to the amount of \$1200 per share. These certificates had subsequently been paid for in bonds of the company, denominated "Dividend Trust Bonds." The plaintiff had disposed of her bonds. Her rights as a bondholder are not involved in this litigation, but only her rights as a shareholder.

The Elyton Land Company, under its charter and amendments, was authorized to buy land and sell lots; to borrow and lend money; to guaranty indebtedness; to build, rent, lease, and use buildings; to issue bonds in amount not to exceed five millions of dollars; and to take stock in other corporations.

In 1893, the Elyton Company was incorporated, with authority to engage in many enterprises not included in the original or amended charter of the Elyton Land Co. The fourth section of the act incorporating the Elyton Co. enacts, "that said corporation may purchase the property, real, personal, and mixed, of the Elyton Land Company: provided that such sale is made under the laws now in force, and nothing in this act shall be construed to impair or in any manner whatsoever to affect the rights of any stockholder of the Elyton Land Company." . . .

At a regular meeting of the stockholders of the Elyton Land Company, a majority of the stockholders voted to sell its entire assets to the Elyton Company. The terms of the sale were, that the Elyton Company should pay all the liabilities of the Elyton Land Company; and issue \$2,500,000 bonds, \$1,796,000 of which were to be issued to the holders of the dividend trust bonds in payment thereof; and in addition issue 10 shares of its stock to each holder of 1 share of stock in the Elyton Land Co. Thereupon the Elyton Land Company transferred all its property to the Elyton Company. The latter issued the bonds provided for, and executed a mortgage to secure them. The stipulated amount of stock was also issued, and was delivered to such of the stockholders as were willing to receive it in exchange for the stock held by them in the Elyton Land Company. No other arrangement or provision was made to pay the stockholder in the Elyton Land Company for his share, except to accept the stock in the Elyton

<sup>1</sup> Statement abridged. Arguments omitted. —Ed.

*sign supra - discussed in absence - express power p 644 et seq  
 2<sup>d</sup> on No. 1. "my has a careful at to maintain that C relates wch it colat  
 liked a corp<sup>n</sup> whose sh<sup>s</sup> they became does n include a C<sup>l</sup> relative only the  
 Corp. 84 3. 275 (98) but cf 122 3. 126 (1903). "I am, open to crit. and support, mas that  
 on a corp obtains by its ch. r't, dispo. of prop to dissolve its corp. ex. st., whereto  
 accept stock in another corp in payt. - purch price, provided trans" is*

This raises diff: in reorg? on yr dissolution? so reorg? plans often provide that there may take a stated sum in cash, or shares, with 1/100th of the stock. Don't have to take 1/100th of the stock. Appraisal stat. Part 86 of Conn. Rel. of Cal CC 8870 - cf 123 US but see nps 544

Company. It is alleged in the bill, and not traversed in the plea, that complainant was not present, was not represented, and had no notice of the meeting of the directors of the Elyton Land Company at which it was resolved to sell its property to the Elyton Company. Immediately after the consummation of the transaction between the two corporations, complainant filed her bill.

To the bill, the respondent filed a plea and answer in support of the plea. The plea set forth the history of the "Dividend Trust Bonds;" alleged that they were valid obligations of the Elyton Land Company; and that the plaintiff, having accepted her proportion of the bonds with full knowledge of the facts, is estopped to deny that they are binding obligations of the Elyton Land Company.

The court ruled that the plea was insufficient as a defense to the bill. Appeal.

*Alex. T. London, and Tompkins & Troy, for appellants.*

*Gordon Macdonald and Smith & Weatherley, contra.*

COLEMAN, J. [After stating the case.] . . .

. . . We do not doubt the right of complainant to relief, so far as the defense is rested upon the plea. In the first place, by its charter, The Elyton Company was authorized to purchase the property of The Elyton Land Company, "provided that such sale is made under the laws now in force, and nothing in this act shall be construed to *im-pair*, or in any manner whatsoever to *affect* the rights of any stockholder of The Elyton Land Company." At the time of the sale and transfer of its property, The Elyton Land Company was solvent, a going corporation, and its stock was very valuable. Its duties and powers were fixed by its charter, and its business evidently managed with great skill and success, for the benefit of its shareholders. The Elyton Company by its charter was authorized to engage in many enterprises not within the scope of the powers of The Elyton Land Company. A shareholder in the latter might not be willing to become a shareholder in the other. By the sale and transfer of the property, The Elyton Land Company divested itself of all its property and capacity to continue the business for which it was organized. If the sale stands, the owner of stock in The Elyton Land Company is compelled to accept the stock of the new corporation, or hold stock in a corporation without capital assets. We lay no stress on the argument, that by its amended charter, The Elyton Land Company is authorized "to take stock" in other corporations. It was certainly never intended by that provision, to authorize The Elyton Land Company to effect its own dissolution by a sale of all its assets, and "take the stock" of another company in payment for distribution to the shareholders or any shareholder, without the consent and contrary to the preference of the shareholder. But it is too clear for argument, that the two million shares of stock of The Elyton Company were to be issued to The Elyton Land Company, as a mere conduit to the shareholder of The Elyton Land Company, and not to

cf 81/378.2

135/472 - issue - vendees stock directly to shh' - vendor violates 889 - provide that n distrib' - cap a corp then than divd' - it shall be made except on dissolution

be held and owned as capital assets of The Elyton Land Company. It may be that a private business corporation may sell out its entire property by and with the consent of less than all its stockholders, for the purposes of paying its debts, or for the purposes of dissolution and settlement, but when this is the purpose, it must be clearly understood, and the terms and conditions of the sale must be within the contractual relations between the corporation and its creditors or shareholders. There can be no presumption that a creditor or stockholder of the dissolved corporation will accept in payment of his demand, anything but money. He cannot be required to do so arbitrarily. While the plea shows the consent and ratification of the complainant to the issue of the certificate of twelve hundred dollars to the shareholder for each share of stock, and its subsequent payment by a dividend bond, it does not show consent or ratification of the sale of the property and the execution of the mortgage. It is manifest that the whole plan of organization of The Elyton Company, was in the interest of those who held the dividend bonds, without reference to the interest of the stockholder. These bonds at first maturing within three or four years were a lien or charge only upon \$2,400,000 of its promissory notes, leaving all its other property unincumbered. By the arrangement, the dividend bonds, amounting to only \$1,796,000, secured by a lien upon \$2,400,000 of notes, were converted into gold bonds, running thirty years, and were secured by a mortgage upon all the property owned by The Elyton Land Company. The bonded indebtedness was increased over a half million dollars. The Elyton Company, from the pleading, did not own a dollar of capital other than that acquired by the purchase from The Elyton Land Company.

The facts set up in the plea do not present an estoppel as to the complainant whatever may be their effect upon the dividend bondholders, and the other stockholders, who aided in carrying out the arrangement, or have since ratified it. — *Kean v. Johnson*, 9 N. J. Eq. 401; *N. O. & C. R. R. Co. v. Harris*, 27 Miss. 517.

*Decree of City Court affirmed.*

On appeal from the City Court, the minority have sold all assets of the company as is to accept a pro rata share of proceeds of stock of the company in lieu thereof. We can be compelled to take  
 15 MORRIS v. ELYTON LAND CO. et al. v. his stock.

1899. 125 Alabama, 263.<sup>1</sup>

BILL in equity, by Mrs. Susie M. Morris, a stockholder in the Elyton Land Company, brought for the same purpose as the bill in *Elyton Land Co. v. Dowdell*, *supra*, p. 541. The plaintiff was an infant at the time of the transactions complained of.

<sup>1</sup> Only so much of the report is given as relates to a single point. Arguments omitted. — Ed.

180 Mo (1904) 79 371 55. — When minority will sell all assets of prop & thereby work a practical dissolution of company as to take up pay of pro rata share of proceeds of sale or in substitution thereof of stock of another Co but may at their election have out of proceeds of sale the prop & the other prop & sell it & then stock at date of sale. Their proportion share of proceeds or they may follow the prop into hands of purchaser & share in it as if it were the same as the use of same ratio that they have shared of sale had it been made & if it was made with them if they may under some cases have a debt set aside & a rehabilitation of company.



The suit is to set aside the transaction. It is for benefit of corp & all stock? hence & compulsory? / 780

Plaintiff applied for the appointment of a receiver.

On the submission of the cause upon the application for a receiver, the chancellor decreed that the transaction assailed by the bill was not binding as to the complainant who was a non-assenting shareholder of the Elyton Land Company, but that the relief to which she was entitled was the payment of the value of her shares of stock in said Elyton Land Company; and he directed that the respondents pay into the court \$12,000 to await the final hearing of the cause, to be held as security for the satisfaction of the final decree; further decreeing that unless they did so within the time named, a receiver would be appointed without further notice. The required deposit was made, and thereafter the chancellor entered a decree denying the appointment of a receiver, and refusing to extend to this cause the existing receivership in cause No. 2104, which was pending in the same court. From this decree the complainant appeals, and assigns the rendition thereof as error.

*Cabaniss & Weakley*, for appellant.

*Alex. T. London*, and *Thomas G. Jones*, contra.

PER CURIAM. [After reaffirming the decision in *Elyton Land Co. v. Dowdell*, 113 Ala. 177; *supra*, p. 466.]

We think there can be no doubt of the proposition, that a court of chancery can and will undo an act, which is *ultra vires*, as well as prevent the same by injunction. There is an equity of rescission as well as of prevention. 2 Spelling on Corp. § 615; *City of Chicago v. Cameron*, 120 Ill. 447; *City of Knoxville v. R. R. Co.*, *supra*; *Byrne's Case*, 65 Conn. 336; *Elyton Land Co. v. Dowdell*, *supra*.

The shareholder's suit, when brought, is for the benefit of the corporation and all shareholders. It is not the suit of the shareholder for his individual interest. The relief granted is the same, as if the corporation sued. — 4 Thompson, Corp., § 4491; 2 Pomeroy's Eq., § 1095; 1 Morawetz, Corp., § 262; *Mount v. Radford Trust Co. et al.*, 5 Am. & Eng. Corp. Cases (N. S.), 92.

It would necessarily and logically follow from this principle that a moneyed compensation to the complaining shareholder for the value of his stock could not against his objection be decreed as his relief. To do so would be nothing more nor less than compelling the shareholder to sell his stock, which a court of equity has not the power to do. That it would be to the benefit of the corporation and all other shareholders in it, to let the transaction stand and compel the dissentient to accept compensation for his stock, is an argument that rests upon no higher grounds than that of expediency. In the administration of justice by the courts, principle should never be sacrificed at the altar of expediency. — *Forrester v. Boston & Montana, &c., Co.*, *supra*; *Kean v. Johnston*, *supra*; *Mills v. R. R. Co.*, *supra*; *Stevens v. R. R. Co. et al.*, 29 Vt. 545.

The application for a receiver was heard on the bill as amended

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might decline to annul lease & min to their remedy at law. Cf 180 Mo. (79 S.W.2d) 517, 710

and exhibits, and answers of respondents, and upon affidavits filed in support of the bill and answers. Upon the undisputed facts in the case, we are of the opinion that the application for a receiver should have been granted, and that the receivership in cause No. 2104 pending in said chancery court should have been extended to this cause. From the action taken by the chancery court, it is evident that the chancellor was of the opinion that upon the facts the complainant was entitled to a receiver in the absence of a deposit by the respondents with the register of the court of \$12,000 as a security for the complainant by way of compensation for her stock in the event of her recovery upon a final hearing. But in this alternative provision, the learned chancellor misconceived the character of the complainant's suit as well as the nature of relief to which she was entitled. For the suit, though brought in her name, was in legal contemplation and effect a suit by the corporation, and the relief, if any had, would be a recovery for the corporation. That the case is a proper one for the extension of the receivership upon the conceded facts is shown by the following authorities: Beach on Receivers, §§ 88, 789; Gluck & Becker on Receivers, 42, § 16; High on Receivers, § 292; *Ala. Nat. Bank v. Mary Lee C. & R. Co.*, 108 Ala. 288; *Bridgeport Dev. Co. v. Tritsch*, 110 Ala. 274; *Scott v. Ware*, 65 Ala. 174; *Stevens v. Davison*, 18 Gratt. 819; *Ponca Mill Co. v. Mikesell*, 8 Am. & Eng. Corp. Cases, (N. S.), 740.

The decree of the chancery court is reversed and the cause remanded.

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BARTHOLOMEW v. DERBY RUBBER CO. *et al.*

1897. 69 Connecticut, 521.<sup>1</sup>

Suit by minority stockholders of a manufacturing corporation, to compel the surrender and cancellation of a lease of its plant to Loewenthal. The directors voted to make the lease, and gave notice of a special stockholders' meeting to confirm their action. The action of the directors was approved by all the stockholders present at the meeting.

The term of the lease thus confirmed was for one year, with a privilege upon the part of the lessee to renew the lease from year to year, for a period not exceeding nine years, upon the same rent and conditions. The lease also provided that at the expiration of any year the lessee might purchase the property if he chose, at a price to be determined upon by an appraisal made in conformity to the mode therein designated.

Other facts are stated in the opinion.

The respondents demurred to the complaint.

<sup>1</sup> Statement abridged. Arguments omitted. — Ed.

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firm & act.  
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unjust & shd. a loss concern may for purpose of protecting whole body & further loss  
as a method of wind up affairs & corp. authy & lease & continue prop. for years  
being made for it?

Edwin B. Gager and Wm. S. Downs, for the respondents Loewenthal et al.

V. Munger, for the petitioners.

ANDREWS, C. J. The plaintiffs are a minority of the stockholders of the Derby Rubber Company. They ask that a certain contract called a lease, between the said company and the other defendants, be set aside and declared to be void. The record shows that this contract was made by the directors of the company; that it was, before delivery, submitted to a meeting of the stockholders duly called for that purpose, and that by a unanimous vote of the stockholders present at that meeting and holding a majority of all the stock, it was affirmed and ratified. The plaintiffs, although duly notified of said meeting and the purposes for which it was to be held, voluntarily remained away.

Plt vol'ly absented  
at L. meeting

If the contract was really ultra vires of the corporation, the plaintiffs may claim that it should be set aside. The contract contains an option to the lessee to become the purchaser of the property at a price to be fixed by a sort of arbitration. The complaint avers that it is the intention of the directors and the majority stockholders, in case the option is used, to divide the money received among all the stockholders and wind up the affairs of the corporation. As a conditional contract to sell the property, this agreement is not questioned; nor could it well be questioned. It is competent for any business corporation to sell its property, pay its debts, divide its assets and wind up its affairs. Especially is this so if the corporation is in an embarrassed condition. It is as a lease for ten years without a sale, that the contract is said to be ultra vires. We speak of the contract hereafter as a lease. The sole question then is: Was the vote ratifying the lease, and so the lease itself, ultra vires and void?

We are inclined to think the lease was not void. The lessee is to continue the same business which the corporation was organized to carry on. The lease, therefore, is not a change in the business, but only a change in the management of the business. The financial condition of the corporation is now depressed, and its business cannot be made profitable under its own management, for want of capital. Additional capital is not available. But neither the directors nor the majority stockholders have so far lost confidence in the concern as to be willing peremptorily to wind up its affairs. The lease was entered into as the best, perhaps the only, means of carrying the corporation over this period of depression, and in the meantime obtaining some income for the stockholders. If a sale takes place it is certain that the property will be worth more in operation than if left idle. Such leases have repeatedly been sustained by the courts of equity.

The case of *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, L. R. 1 Eq. 318, 326, was like the one in hand, in this: Minority stockholders asked to have a lease of the entire property of the corporation set aside. That company was incorporated for "the working, pre-

paration, and sale of porcelain clay," with power to combine "mining operations" with the original business. After a period of unsuccessful working, a majority of the stockholders voted to and did lease the whole of the works and buildings of the company for the period of twenty-one years. It was held that this was a valid lease, not beyond the power of the company to make. The Vice-Chancellor, SIR WILLIAM PAGE WOOD, in giving the opinion, said: "It appears to me that I should be controlling improperly the effect of this deed, if I did not allow this company to do that act which through the medium of their directors they have done. . . . Have the company by this act which they intend to carry into effect, . . . either on the one hand abandoned their purposes, . . . or on the other hand, exceeded their purposes? Have they done either one or the other? It appears to me they have not abandoned the purposes of the company. They have granted a lease for twenty-one years, and, so far, they have agreed to take a rent for their property instead of working it themselves, and taking the profit. At the end of twenty-one years they are to have the whole of the property back, and, as it appeared to them (that is the true way to put it, for they are the sole judges on that part of the case), they would have it back in a more profitable condition. . . . They have not exceeded their powers, because nobody can contend that parting with their property for a certain time is exceeding their powers, beyond this, that during all that time they are not carrying on the business. But, as to that view, I apprehend that it is perfectly competent for a meeting (i. e., of the stockholders) to say: 'China clay is in a very depressed state — the market is very bad — and we agree it is better not to work it for two or three years.' That would be entirely within their functions, and they would not be said, in that respect, to have abandoned their work, or to have exceeded the functions allowed them." The bill was dismissed with costs.

In *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712, 718, a company was established "for the erection, finishing, and maintenance of a hotel, . . . and the doing all such things as are incidental or otherwise conducive to the attainment of" that object. The directors of the company let, for a stipulated period of five years, to the head of a government department for the business of his office, a large part of the hotel. There was evidence that this use would be advantageous to the company in its intended business. This, too, was a bill by minority stockholders asking that the lease might be declared invalid. It was held that the arrangement was valid. In the House of Lords, the Lord Chancellor (LORD CAMPBELL) said: "From the large rent immediately to be received by the company for the occupation of the one hundred and sixty-nine rooms by the India Board; from the monopoly to be enjoyed by the company in supplying so many persons with refreshments; and from the fashionable reputation to be conferred on the hotel by this association, the opinion expressed by the majority of the stockholders, that the arrangement is beneficial

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to them, is likely to be verified. This anticipation would not be sufficient if the original undertaking had been abandoned, or if there was any extension of the original undertaking; but as there is neither abandonment nor extension of the original undertaking, and the arrangement may assist instead of obstructing the prosecution of the original undertaking, I must advise your Lordships to affirm the decree appealed against."

In *Temple Grove Seminary v. Cramer*, 98 N. Y. 121, a company incorporated as an academy, or seminary of learning, was held not to have exceeded its powers by leasing one of its buildings during the vacations for a boarding-house. See also *Lafond v. Deems*, 81 N. Y. 507. In *Brown v. Winnisimmet Co.*, 11 Allen, 326, a company chartered as a ferry company let one of its vessels not needed in its ferry business to be used in another business. This was held not to be an *ultra vires* contract. See also *City Hotel v. Dickinson*, 6 Gray, 586; *French v. Quincy*, 3 Allen, 9; *Lyndeborough Glass Co. v. Mass. Glass Co.*, 111 Mass. 315; *Calloway Mining, etc., Co. v. Clark*, 32 Mo. 305; *Watts's Appeal*, 78 Pa. St. 370; *Dupes v. Boston Water Power Co.*, 114 Mass. 37.

We have considered this case on the assumption that the action of the directors and the majority stockholders was done in good faith and in the honest belief that they served the best interests of all concerned. If fraud had been charged a very different case would have been presented. Counsel for the plaintiffs says in his brief that the lease was fraudulent on its face. But fraud is not charged in the complaint. Fraud is never to be presumed. While fraud may in some cases be inferred from the facts, it is never to be inferred unless it is charged; and then only where the facts and circumstances indicate clearly that fraud has been committed.

The Superior Court is advised that the complaint is insufficient, and to sustain the demurrer.

In this opinion the other judges concurred.<sup>1</sup> 5 : 16

<sup>1</sup> "The remaining errors complained of . . . may be considered together, namely, that the directors of the corporation, plaintiffs, had no power to make the lease sued on. It is supposed that a company chartered for the purpose of manufacturing and refining oil cannot lease its entire property, and so defeat the very purpose for which its charter was granted. But corporations, unless expressly restrained by the act which establishes them, or some other act of assembly, have, and always have had, an unlimited power over their respective properties, and may alienate and dispose of the same as fully as any individual may do in respect to his own property. Hence an insolvent corporation may make a general assignment for the benefit of its creditors, and this power may be exercised by the directors, unless special provision to the contrary is made in the charter. *Dana v. Bank of United States*, 5 Watts & Serg. 223. If they can alienate absolutely, they may lease, which is but a partial or temporary alienation. *Omne majus continet in se minus.*"

SHARSWOOD, J., in *Ardesco Oil Co. v. North American Oil Co.*, A. D. 1870, 66 Pa. State, 375, pp. 381, 382. — Ed.

147 DOW, C. J., IN DOW v. NORTHERN R. R. *et al.*

1887. 67 *New Hampshire*, 1.

[UPON a bill in equity, by minority stockholders of the Northern Railroad, seeking to enjoin the operation of the Northern Railroad by the Boston & Lowell Railroad under a lease for 99 years, approved by a two-thirds vote of the stockholders.]

DOW, C. J. . . . The lease of the Northern to the Lowell is an attempt to compel the plaintiffs, dissenting stockholders of the Northern, to exchange for ninety-nine years all their interest in the Northern for an annuity, secured by a right of entry, practically equivalent to a mortgage enforceable by strict foreclosure. The possibility of a non-payment of the annuity, and a resumption of the carrier business by the Northern, has no bearing on the question of the validity of the exchange of that business for the annuity. This question is to be decided on the possibility and the presumption that the Northern will have no occasion to resort to its security. The circumstance that the money to be received by the Northern is divided into many sums, due at different times, is immaterial. The law of the case is what it would be if the price paid for the estate of ninety-nine years had been paid in a single sum before the purchaser took possession of the road, and the security given were merely for the performance of covenants not relating to the payment of the price. The payment of the whole price in one sum, and the division of it among the Northern stockholders, would leave them members of their corporation and owners of an estate in remainder. Instead of being a step in a process of dissolving the Northern company and winding up its affairs, the lease requires that company to "keep up and preserve its organization." Whether each stockholder's share of the price of the estate sold is paid to him in one sum at one time, or in many sums at many times, the sale of the road for ninety-nine years is not a provision for the Northern company's working the road, which by the terms of the sale is to be worked during that time, not by the Northern and the Lowell as joint principals, nor by the Lowell as agent of the Northern, but by the Lowell for the Lowell as sole principal.

99 yr lease.

As agents, the majority can do whatever is necessary to carry on, for their principal, the principal's business of a common carrier between Concord and Lebanon. Within limits, they can select the mode and means of executing their agency. The lease, instead of being a mode or means of their carrying on that business for their principal, transfers it to another principal for ninety-nine years, and transfers their principal to the vocation of a landlord and rent-receiver, which is not, in kind or degree, the same business as carrying passengers and freight. The legal scope of their employment is within the

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bounds of their principal's business, or, at most, those bounds and a proceeding for winding up that business, and dissolving their principal.

The retirement of the Northern company from the industrial activity of common carriers to the leisure of mere rent-receivers was a change in the object of the partnership. The legal character of the change did not depend upon the circumstance that the partners never intended to perform all their mental and manual labor in person. The labor now done and the tolls now received on the road are not theirs.

" . . . Because the corporators may, with the consent of the state, by the vote of a majority or two thirds in interest, abandon their enterprise, sell out their property, and return his share of the proceeds to each stockholder, it does not follow that by the same authority the works may be leased to be carried on and conducted by others, the corporation continuing to exist. The right to elect the directors, by whom the business is to be managed, is a provision in the charter which the state or a majority cannot interfere with; it is a contract. The true question on that point here is, whether the making of this lease and contract is an exercise of the power of managing the business and concerns of the corporation conferred in the charter, such as can be used by consent of a legal majority of corporators, without that of all." *Zabriskie*, Chancellor, in *Black v. Canal Co.*, 22 N. J. Eq. 130, 407. See, also, 22 N. J. Eq. 405, 408, 415, 416; *Zabriskie v. Railroad*, 18 N. J. Eq. 183.

By their charter-contract all the stockholders of the Northern Railroad agreed that their partnership business should be the transportation of passengers and freight on their road, including certain incidental enterprises contributing to the transaction of that business. They formed the partnership for no other private purpose than the benefit to be derived from their performance of this contract, legally altered as it may be, under legislative permission, by their express or implied assent. No alteration has authorized a part of the company to suspend the company's performance of the contract by transferring their road and business to other principals for ninety-nine years. The plaintiffs have not acquiesced in the transfer and suspension, but have objected seasonably, and presumably in good faith, for the purpose of protecting their Northern shares. The lease violates the partnership contract, and takes from the plaintiffs an equitable estate of ninety-nine years without their consent, and without prepayment of the value of the estate taken. Whatever names are used to designate the trust and agency of the corporate partnership and the relation existing between each stockholder and the company, he has some remedy for their breach of the contract. "Wherever there is a legal right vested in a party, he must, in some court, have the means of enforcing that right." *Adley v. Whitstable Co.*, 19 Ves. Jr. 304, 305.

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The private property of the Northern company, subject to a public right of transportation, is held in trust by the corporation for the benefit of the stockholders. The corporation is trustee, holding the legal title. The stockholders are the beneficiaries, holding the equitable interest. "The jurisdiction to enforce performance of trusts arises where property has been conferred upon and accepted by one person on the terms of using it for the benefit of another." *Adams Eq. 26*. The rule is, that the equitable ownership includes a legal right to a performance of the trust which can be specifically enforced in a court of equity; and the authorities do not recognize a breach of corporate trust as an exception to the rule.

An injunction against the lease as a breach of the Northern trust is, in effect, a decree that the trustee specifically perform the charter-contract and the trust declared in it. In the bill, the plaintiffs ask that the Northern company and their directors be ordered to resume the control, management, and operation of the Northern road. A decree for the plaintiffs, whether affirmative or negative in form, would run against the trustee, — not a mere imaginary person, but the whole body of stockholders, whose performance of their corporate trust is performance of their partnership contract. Whether the plaintiffs' rights, accruing from the contract, are called contractual or fiduciary, they are subject to the general rule that inequitable performance is not specifically enforced when recoverable damages for non-performance are an ample remedy. The equity to compel specific performance of contract arises where an agreement, binding at law, has been infringed, and the remedy at law by damages is inadequate. *Adams Eq. 77*; *Story Eq., ss. 716, 717 a*; *Fry Spec. Perf., s. 40*; *Pom. Spec. Perf., s. 3*; *Southern Express Co. v. Railroad*, 99 U. S. 191, 200; *Eckstein v. Downing*, 64 N. H. 248; *Black v. Canal Co.*, 22 N. J. Eq. 130, 399. But the adequacy of a compensatory suit on a broken contract does not always depend upon the breach being financially injurious to the plaintiff. A breach that would be pecuniarily beneficial to him may be of such a nature in other respects that nothing short of prevention will be just. If the price fixed by a written executory agreement for the sale of a farm is more than the value, that fact is not an answer to a bill brought by the purchaser against the vendor for specific enforcement of the agreement. The purchaser, financially benefited by the violation of his legal right, would be financially injured by resorting to the remedy of a suit for nominal damages. "Compensation in damages, measured by the difference in price as ascertained by the market value and by the contract, has never been regarded in equity as such adequate indemnity for non-fulfilment of a contract for the sale or purchase of land as to justify the refusal of relief in equity." *Jones v. Newhall*, 115 Mass. 244, 248. The vendor's payment of the difference is not regarded by the law as a full, sufficient reparation for the purchaser who made the contract "on a



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DOW V. NORTHERN R. R.

particular liking to the land." *Buxton v. Lister*, 3 Atk. 383, 384; Sto. Eq., s. 717. The damage is irreparable in the legal sense.

A written contract of farming partnership may be specifically enforced by an injunction against its violation when a majority of the partners make an unauthorized attempt to turn the whole partnership property and business over to other principals for ninety-nine years in exchange for an annuity or other investment. On the question of equity jurisdiction, the mere expediency of the exchange as a financial measure would be as immaterial as the corporate or unincorporate form of the partnership organization. The recovery of one dollar by an expenditure of one hundred, in a suit at law, would not be a sufficient remedy for a partner objecting to the illegal change of his business. Specific relief would not be less necessary than in the case of a refusal to perform a written agreement for the sale of land.

Performance of the Northern charter-contract would not be rendered inequitable in law by the mere fact of non-performance being  
 \* more beneficial to the stockholders. The plaintiffs' equitable right to be principals in the common-carrier business between Concord and Vermont, according to their contract, would not be barred by a finding that it would be better for them to exchange that business for the occupation of a lessor, or the business of a road running from Concord to Maine or Massachusetts. They have not agreed that their partners may take them from the stipulated position of principals in the work of carrying passengers and freight between Concord and Lebanon, and give them any other vocation in which a court or jury may think they would be more profitably and judiciously employed. Their expulsion for ninety-nine years from the Northern carrier business, in violation of their partnership contract, is a case in which the general principle of equity gives an injunction, and the evidence shows no exceptional reason for withholding the specific relief necessary to prevent their wrongful exclusion from their chosen employment.

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(H) *Personal Exception to the Shareholder.* *Law Rep. 197-804 Dec. 207 Key.*

FORREST v. MANCHESTER, &C. RAILWAY CO.

" 182(V)

1861. 4 *De Gaz, Fisher & Jones*, 125.<sup>1</sup>

THIS was the appeal of the plaintiff from the dismissal of his bill by the Master of the Rolls. The plaintiff was a shareholder in the Manchester &c. Railway Co.; and sued, on behalf of himself and the other shareholders of the company, for an injunction to restrain the defendants from conveying in vessels or boats passengers, cattle, or goods from Hull or Grimsby to Spurn Point.

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The bill alleged that the traffic sought to be restrained was beyond the powers of the company under their Act, and was also prejudicial to another company called The "Gainsborough United Steam Packet Company, Limited," in which the plaintiff was a large shareholder.

The answer stated, *inter alia*, that the suit was not for the benefit of the other shareholders of the company on whose behalf the plaintiff held himself out as suing, but was instituted solely to promote and serve the interests of the Gainsborough United Steam Packet Company Limited, and that all the other shareholders of the defendants' company were opposed to the suit.

Evidence was gone into, and the plaintiff on his cross-examination admitted, that he held only 82l. stock in the railway company, but was the holder of twelve 30l. shares in the packet company, which was paying a dividend of 10l. per cent; and that the excursion traffic had been continued for eight or ten years. He also admitted that the directors of the packet company had directed the institution of the suit, and indemnified him against costs. The Master of the Rolls dismissed the bill on the ground that the Act sought to be restrained was not *ultra vires*.

The dir. of this Co  
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bring suit & co  
indemnified him  
v costs

*Sehoyne*, and *E. K. Karlake*, for appellant. [Citations omitted.]

*The Solicitor General (Sir R. Palmer)* and *Fischer*, for respondents, were not called upon.

THE LORD CHANCELLOR [WESTBURY]. In this case I am asked to reverse the order of the Master of the Rolls dismissing this bill with costs. I desire it to be distinctly understood that my decision does not proceed upon the grounds stated by the Master of the Rolls. It is unnecessary for me to express any opinion upon the grounds stated by his Honor which, if they are correct, would be confined entirely to this particular case, because they have reference to the peculiar constitution of the present company. But the ground upon which I proceed is entirely that of personal exception to the character of the plaintiff, and the foundation of my decision is contained in this passage of the plaintiff's own examination not attempted to be qualified or questioned. He says in that examination "The directors of the packet company

<sup>1</sup> Statement abridged. — Ed.

directed the institution of this suit and indemnify me against costs." It is not that they persuaded him to institute the suit, not that they instigated the suit, but that the directors of the other company have "directed the suit," and are to indemnify the plaintiff against the costs of it. To use a familiar expression, the plaintiff is the puppet of that company. It has been a very wholesome doctrine of this Court that one shareholder having in view the legitimate purposes of the company may be permitted in this Court to maintain a suit on behalf of himself and the other shareholders of the company, but the principle upon which that constructive representation of the shareholders is permitted indisputably requires that the suit shall be a *bonâ fide* one, faithfully, truthfully, sincerely directed to the benefit and the interests of those shareholders whom the plaintiff claims a right to represent. But can I permit a man who is the puppet of another company to represent the shareholders of the company against whom he desires to establish the interests and benefits of a rival scheme? That would be entirely contrary to the principle upon which this constructive representation has been permitted to be founded. When the plaintiff sues in that capacity any personal exception to the plaintiff remains, and it would be in direct contradiction of every principle of truth and justice if I permitted a man to come here clothed in the garb of a shareholder of company A., but who is in reality a shareholder in company B., and has no sympathy whatever with, no real purpose of promoting the interests of the other company. Such a thing would be so much at variance with the principles of a Court of Equity that it would be impossible for it to entertain a suit of that description which is a mere mockery, a mere illusory proceeding.

It is, however, said that this objection was considered some years ago in the well-known case of *Colman v. The Eastern Counties Railway Company*,<sup>1</sup> and was overruled by the late Master of the Rolls, Lord LANGDALE. All I mean to say about that case is that the objection there proceeded upon a different ground. The proposition of Lord LANGDALE is that it is no ground of personal exception to a plaintiff that he has been instigated to institute his suit by another company. If the proposition be limited to the extent of the words in which it is expressed, possibly there may be no exception to that proposition, but undoubtedly I would not assent to it if carried one jot beyond those limits. I desire, however, to point out again the wide difference which exists between a suit "directed" to be instituted by the directors of another company, and a suit which is *bonâ fide* instituted by the plaintiff, persuaded only to the institution of it by the arguments of another company. In the one case the suit is the suit of the plaintiff, and is for ought that appears instituted at the peril of the plaintiff. In the other case, the whole origin of the suit and the direction and conduct of it emanate altogether from the other company, and the suit would

<sup>1</sup> 10 Beav. 1.

have no existence whatever but for the order of the other company. I consider, therefore, that the language in which the Master of the Rolls expresses himself upon the proposition then submitted to him does not in the smallest degree interfere with or weaken the ground that I have taken.

I have nothing to do with the motives of plaintiffs suing in this Court. If they come here in a *bond fide* character, the reason for their coming here is a matter beyond the province of a Court of Justice to inquire into.<sup>1</sup> But if a man comes here representing to me that he is a *bond fide* shareholder in a company, and that it is the *bond fide* suit of that company, and it turns out not to be the suit of that company, but in reality to be in its origin and its very birth and creation the suit of another company, then I repeat that this is an illusory proceeding, and ought not to be attended to by the Court. The well-known words, — the trite quotation, — will occur to the minds of those who hear me. “*Fabula non est iudicium in scenâ non in foro res agitur.*” If this gentleman be permitted to come and assume merely for the purpose of coming into this Court the garb of a shareholder, but at the same time explicitly announces, “This suit is not directed to the purposes of that company; I have nothing in common with the shareholders of that company; it has not emanated from the wish of the shareholders; it does not emanate from me as a shareholder; it is not my act: I am directed to do it by another party, and another body of men,” then in point of fact the suit is not the expression of his own will, nor is it the legitimate prosecution of his own interests or his own objects, but it is the prosecution of the interests and objects of persons who have no right whatever to invoke the interference of this Court.

I treat this suit as an imposition on the Court. By these words I mean no reflection upon the plaintiff himself, because he has told the truth, and does not appear at any time to have desired to conceal it. But as he comes here in the character of a shareholder in the company, and tells me frankly that the institution of the suit is not his own act, but an act that he has been directed to do by the other company, then, using the words without offence, I denominate that suit an imposition on the Court, and I dismiss it accordingly, and affirm, though on a different ground, the order that has been made.

I refuse this application with costs.

<sup>1</sup> See Kerr Inj. 549.

If a real P of his motive is immaterial whether friendliness to some other Co. or personal spite or etc. not beneficial. Co?  
1. 21 L. Jo 6873. 6-7. 45 NW 1068 (9a). 2. Pm ca. 3 40 Ga 552, 553

## SEATON v. GRANT.

1867. L. R. 2 Chan. Ap. 459.<sup>1</sup>

THIS was an appeal from an order made on the 12th of February, 1867, by Vice-Chancellor *Malins*, refusing an application of the Defendants that the bill might be taken off the file, or that all further proceedings might be stayed.

The bill was filed by *Charles Seaton*, on behalf of himself and all other shareholders in the *Credit Foncier and Mobilier of England, Limited*, except the Defendant, *Albert Grant*, against *Albert Grant*, *George Edward Seymour*, and the above-named company, under the following circumstances:—

The Defendant, *Albert Grant*, was the managing director of the above-named company. The Defendant, *George Edward Seymour*, was the chairman of a company called the *City of Milan Improvements Company*. The Plaintiff alleged that the two last-named Defendants had, in the year 1865, formed what is called a “syndicate” on the *Stock Exchange*; that is, a combination for the purpose of raising the value of the shares of the *Milan Company* to a fictitious premium; and that, with this end, *Grant* had purchased 12,129 shares in the *Milan Company*, and paid for them out of the funds of the *Credit Foncier*, by which the latter company had sustained a great loss, the shares of the *Milan Company* having fallen very much in value.

He also alleged that the Defendants were taking measures to re-constitute the *Credit Foncier*, by dissolving the company, and transferring its assets and liabilities to a new company.

The bill prayed that the Defendants, *Grant* and *Seymour*, might repay to the *Credit Foncier* the money expended in the purchase of the shares in the *Milan Company*, and that the *Credit Foncier* might be restrained from handing over their assets to any other company, until all their debts and liabilities had been paid and satisfied.

The bill was filed on the 19th of July, 1866, and immediately afterwards the Plaintiff moved for an injunction, in terms of the prayer, before Vice-Chancellor *Kindersley*, who refused the motion with costs.

On the occasion of the motion, the Plaintiff was cross-examined in Court, when it appeared that he held only five shares of £20 each in the *Credit Foncier*, which he acquired solely for the purpose of filing this bill; and that his reason for filing the bill was that he and several of his friends had lost money by speculating in shares of the *Credit Foncier*, and that he was advised that if he bought shares, and then filed a bill to impeach certain transactions of which he had notice, he would probably be bought off at a high price, and so obtain compensation.

<sup>1</sup> Portions of argument, and of opinions, omitted. — Ed.

Subsequently to the filing of the bill, two extraordinary meetings of the *Credit Foncier* were held on the 30th of July and the 15th of August, 1866, at which resolutions were passed for winding up the company voluntarily, and for the formation of a new company, for objects which would include the carrying on of the business of the *Credit Foncier*.

The Defendants put in answers to the bill, but refused to give full information to the Plaintiff as to the transactions complained of; and their answers were excepted to by the Plaintiff.

The motion now under appeal was made by the Defendants *Grant* and the *Credit Foncier*, and, having been refused by the Vice-Chancellor, was now renewed before the Lords Justices.

The *Attorney-General* (Sir John Rolt), Mr. *Karslake*, Q.C., and Mr. *Waller*, for the company; and

Sir *Roundell Palmer*, Q.C., Mr. *Bailey*, Q.C., and Mr. *Speed*, for the Defendant *Grant*:—

We say, first, that this suit is not *bond fide*. The Plaintiff had no shares in the company while the bill was being prepared; he bought five shares just before it was filed, and can give no reason for his proceedings, but that he had lost money by speculating in the shares of the company, and wanted to make the company repay him these losses. The Court will not entertain such a bill: *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company*.<sup>1</sup> That case decided that the Plaintiff must have a legitimate interest in the subject matter of the suit. The interest of the Plaintiff is merely nominal. If his whole claim is recovered, and divided among the shareholders, his share would be about 40s. Such a bill is an abuse of the process of the Court, and partakes of the nature of maintenance: *Filder v. London, Brighton, and South Coast Railway Company*; <sup>2</sup> *Foxwell v. Webster*.<sup>3</sup>

[Remainder of argument omitted.]

Mr. *Wickens*, for defendant Seymour.

Mr. *Glasse*, Q.C., and Mr. *Cracknall*, for plaintiff, were not called on.

[The opinion of SIR G. J. TURNER, L. J., is omitted.]

LORD CAIRNS, L. J. This motion is one of a very novel, but of a very important character, because it asks the Court to shut the door in the face of the Plaintiff, not on the merits of the case, but on the ground that he has by his conduct disentitled himself to institute the suit. The theory of the law of this country is, that every subject has a right to bring his complaint to a hearing, if it be not capable of being stopped by a demurrer or a plea. The exceptions which have been established to this rule merely shew the strength of the general rule. Those exceptions are four in number:—First, where the Plaintiff is required to give security for costs. That is hardly an exception, because the Court only stays the proceedings in the suit until the

<sup>1</sup> 9 W. R. 818.

<sup>2</sup> 1 H. & M. 489.

<sup>3</sup> 12 W. R. 94, 186.

security is given. Second, where the Defendant is willing to give to the Plaintiff all the relief which he asks, and to pay his costs of the suit. Third, where the subject matter of the litigation has perished, or has been removed, and nothing remains to be decided but the payment of costs of the suit. There the Court considers that it would be useless to allow the suit to go on to a hearing when the only question to be determined can be as well decided upon motion. Fourth, where the bill has been filed without the authority of the person who appears as the Plaintiff, or where the name of a corporation has been used without a sufficient title to use it. In such a case the bill is treated as a fraud upon the Court, and is therefore ordered to be taken off the file.

The grounds alleged for the present motion are three:—First, a personal exception to the Plaintiff. I do not think that I unfairly represent the conclusion which the parties desire to draw from the cross-examination of the Plaintiff if I put it in this way. The Plaintiff had in a collateral way lost some money, and he then finds a blot in the management of the company of which he thinks the shareholders might complain. He buys five shares in the company, and then files this bill, in order to induce the company to buy off the litigation. That, no doubt, is a course of conduct which would meet with little approval in this Court, or, indeed, in any other Court, and such conduct might be material at the hearing with reference to the amount of relief which the Plaintiff could obtain, or whether he was entitled to any relief at all. But the question is, whether these facts are necessarily fatal to the Plaintiff's claim to relief? Suppose an answer were put in admitting all the allegations contained in the bill, it would be difficult to say at this stage of the suit that the Plaintiff's conduct would altogether disentitle him to relief. The case of *Forrest v. Manchester, Sheffield, and Lincolnshire Railway*,<sup>1</sup> which was relied upon in the argument, is distinguishable from the present case upon two grounds: first, because that was the hearing of the cause; and, secondly (and this is the main distinction), because there the Court came to the conclusion that the Plaintiff was simply a puppet in the hands of another company, and that he was indemnified by that company against the costs of the suit. That objection amounted to this, that a suit professing to be the suit of Company A., was really the suit of Company B.

The second ground relied on in support of this motion was, that the Plaintiff's *quantum* of interest in the suit was very insignificant. But if we should hold that the suit can be maintained in other respects, I think that the aggregate interest of all the shareholders in the subject matter of the suit is amply sufficient to sustain the suit.

[Remainder of opinion omitted.]

*Motion refused with costs.*

*A stock who has assented to or acquiesced in a transaction cannot maintain a bill  
Even tho' transaction is void he has notified Co that he accepts benefits  
we prejudice to his rights on account of his acceptance benefits came after the  
commencement of the suit.*

WORMSER v. METROPOLITAN STREET RAILWAY COMPANY. 559

*1. of S.C. below 90 NY 5714*

150 WORMSER v. METROPOLITAN STREET RAILWAY  
COMPANY.

1906. 184 N. Y. 83.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 28, 1904 affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

In February, 1902, the president of the Metropolitan Street Railway Company communicated in writing to the stockholders of that corporation a plan for providing money (approximately \$23,000,000) to pay its unfunded debt incurred in the purchase of stock of the Third Avenue Railroad Company and to defray the expense of extending its electrical system to eighty miles of railroad lines still operated by horsepower. That communication stated the plan or proposition as follows: A corporation known as the Metropolitan Securities Company had been organized under the laws of New York, with a capital stock of \$30,000,000, all of which had been underwritten at par by Messrs. Kuhn, Loeb & Co., conditioned upon the ratification of the lease hereinafter mentioned.

The Metropolitan Securities Company had acquired all the outstanding capital and stock and other securities of the Interurban Street Railway Company, a corporation with an authorized capital stock of \$20,000,000, owning and controlling franchises for the construction and operation of street railroads on an extensive mileage in the borough of The Bronx and adjacent territory. An agreement had been entered into between the Metropolitan Securities and the Interurban Street Railway Company, whereby the Securities Company was to pay into the treasury of the Interurban Company at least \$23,000,000 in cash, receiving in return stock of the Interurban Company at par and interest-bearing four per cent debentures.

An agreement or lease had been entered into, subject to the approval of the stockholders, between the Metropolitan Street Railway Company as lessor and the Interurban Street Railway Company as lessee, whereby, among other things, the lessee agreed (1) to assume the fixed charges of the Metropolitan Street Railway Company and unconditionally guarantee seven per cent per annum upon the entire amount of its capital stock, payable quarterly; and (2) to pay \$23,000,000 into the treasury of the Metropolitan Street Railway Company in return for the securities which should be liberated by the payment of the unfunded debt, and other almost entirely unproductive assets, said sum of money to be expended in liquidating the unfunded debt and in completing the electrical equipment of the Metropolitan system, and to be paid as required for those purposes.

As a part of the proposed arrangement, the stockholders of the Metropolitan Street Railway Company were to be accorded the privilege



of subscribing at par for an amount of the stock of the Metropolitan Securities Company equal to forty-five per cent of the par value of the capital stock of the Metropolitan Street Railway Company; that is to say, they were to be allowed to subscribe for \$23,400,000 of such stock out of the total capital of \$30,000,000.

It was also proposed, in connection with the foregoing plan, that the Metropolitan Street Railway Company should create a refunding mortgage, the details of which arrangement it is unnecessary to state, as they are not material here.

The said communication of the president of the Metropolitan Street Railway Company also stated, as was the fact, that a meeting of the stockholders had been called for March 20, 1902, to act upon the agreement or lease with the Interurban Street Railway Company, and to authorize the proposed refunding mortgage.

At a meeting of the stockholders of the Metropolitan Street Railway Company the lease and plan were assented to by a large majority of the stockholders, and thereafter ninety-nine per cent of all the stockholders, including those who voted at the meeting, acquiesced in the arrangement which was thereafter carried out.

The present suit is an action of equitable nature, brought by a stockholder of the Metropolitan Street Railway Company on behalf of himself and all other stockholders of the corporation similarly situated who may elect to come in, to enjoin the Metropolitan Street Railway Company and the Interurban Street Railway Company, their officers and agents, from carrying out the said lease, plan or arrangement, and to have the same set aside as illegal and void. The complaint attacks the scheme as fraudulent in fact, and assigns four specifications of fraud as follows: (1) That the proposed lease is fraudulent because it limits the rent to seven per cent on the Metropolitan stock, while the actual earnings of the Metropolitan Company are alleged to exceed seven per cent, and will in the near future, as the plaintiff believes, exceed ten per cent; (2) that the Interurban Company has no sufficient property to secure the payment of the seven per cent guaranteed by it, nor does it possess any property or means from which said rental can be paid; (3) that the obligations of the Metropolitan Company to the citizens of the borough of Manhattan for conveying passengers therein cannot legally be devolved upon the Interurban Company; and (4) that the privilege offered to the stockholders of the Metropolitan Street Railway Company to subscribe to the stock of the Metropolitan Securities Company is in effect a bribe.

At the time of the commencement of this suit the plaintiff owned a thousand shares of the stock of the Metropolitan Street Railway Company. Before the answer was interposed he exercised the option, conferred upon the Metropolitan Railway stockholders by the aforesaid plan, of subscribing to the capital stock of the Metropolitan Securities Company in respect of 885 of his shares, and sold his option or privilege to third parties, receiving therefor over \$5000.

The answers of the defendants denied all allegations of fraud and set up the exercise of this option by the plaintiff as a separate defence. No other stockholder joined with the plaintiff in the prosecution of the suit. Upon the trial of the case at Special Term judgment was rendered dismissing the complaint upon the merits, and findings were made which negative all charges of actual fraud. The judgment of the Special Term was unanimously affirmed by the Appellate Division.

WILLARD BARTLETT, J. Where the objection to the acts of a corporation is that they are *ultra vires*, without being either *mala prohibita* or *mala in se*, a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder. Whether his conduct in so doing constitutes an estoppel in the strict sense of that term, or a quasi-estoppel, as Mr. Bigelow puts it (Bigelow on Estoppel [4th ed.], chap. xix), or be denominated merely an acquiescence or an election, or the assumption of a position inconsistent with an attack, makes no essential difference here. The point is, that the seeking and acceptance of a substantial benefit which would be unavailable to the stockholders except as a result of the acts which he would attack as *ultra vires* preclude him from assailing those acts on that ground. A litigant is not at liberty to deny the validity of a contract, which is neither prohibited by law nor evil in itself, after he has knowingly sought and obtained pecuniary advantages, pay or compensation, under and by virtue of such contract.

This doctrine applies to the present case and is conclusive against the maintenance of this action by the plaintiff. He has sold the privilege attaching to 885 of his Metropolitan Railway Company shares to subscribe to the stock of the Metropolitan Securities Company for between \$5000 and \$6000. This privilege would have been absolutely non-existent except for the plan and lease which he attacks in this suit. He was well aware of this and he cannot avail himself of the privilege and at the same time prosecute the suit.

The officers of a corporation who are sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied. (*Holmes v. Willard*, 125 N. Y. 75, 82.)

In *Post v. Beacon Vacuum Pump & Electrical Co.* (84 Fed. Rep. 371) the United States Circuit Court of Appeals in the First Circuit considered the sufficiency of a bill in equity filed by stockholders of the Beacon Vacuum Pump & Electrical Company to rescind a transfer of its property to the Beacon Lamp Company; and it was held that the complainants being minority stockholders who opposed the transfer were estopped from maintaining a suit for rescission on the ground of *ultra vires*, because they had subscribed for their proportion of the stock of the new corporation, although under protest, and had per-

mitted such company to conduct the business for eighteen months. "It is clear," said PUTNAM, C. J., "that the complainants have not maintained that consistent position necessary to relieve them against an equitable estoppel. They admit that they have subscribed for their proportion of the 32,000 shares of stock in the new corporation. They do not state the date when they made the subscription. The transfer of the assets to this corporation was made in July, 1895, and the bill was not filed until the 12th day of January, 1897, so that, although at the outset they protested against the reorganization, yet their subscriptions, in the absence of any proper allegation otherwise, must be presumed to have been made at such a time as justified the respondents in assuming that the lamp company was authorized, so far as the complainants were concerned, to receive the transfer of the property of the old corporation, and to commence and carry on its manufacturing business, thus involving itself in the liabilities and other complications inevitably arising therefrom. *That this raised an estoppel in equity as against a bill praying rescission is too clear to need discussion.* It is true that complainants allege that this subscription was under protest, and only to preserve their rights; but the bill does not give the court any details which would enable it to perceive that, by any possibility, the effect of the subscription, which of itself would be an accomplished fact, could be overcome by any protest or other formal reservation which might accompany it."

In *Towers v. African Tag Company* (L. R. [1 Ch. 1904], 558), which was a suit by two shareholders of the defendant to compel the directors to repay to the company the amount of a dividend illegally, though honestly, declared and paid, the decision of the English Court of Appeal is accurately stated in the head note as follows: "A shareholder in a limited company who has, with full notice or knowledge of the facts, himself received part of the proceeds of an *ultra vires* act committed by the directors — such as payment of a dividend out of capital — and who still retains the money, cannot, either individually or as suing on behalf of the general body of shareholders maintain an action against those directors." Lord Justice VAUGHN-WILLIAMS, in the course of his opinion, says: "If it be the fact, as I think it is, that these plaintiffs knew of all that had been done, received their dividends with knowledge of all the facts, and then brought this action with the money still in their pockets, ought they to be allowed to bring this action, which, as I have pointed out, is, to my mind, an action such as they can bring in consequence of their personal interest in the matter? I think not. I think that an action cannot be brought by an individual shareholder complaining of an act which is *ultra vires* if he himself has in his pocket at the time he brings the action some of the proceeds of that very *ultra vires* act. Nor, in my opinion, does it alter matters that he represents himself as suing on behalf of himself and others. I think that the reason which requires us to say he ought not to bring such an action equally requires us to say that he ought

not to be the peg upon which such an action is to be hung for the benefit of others."

The proposition that one may not deny the validity of a contract under which he has taken advantages was forcibly asserted by the Supreme Court of the United States in the case of *United States ex rel. International Contracting Co. v. Lamont* (155 U. S. 303). There the relator applied for a writ of mandamus against the secretary of war to compel him to execute and deliver a contract under an advertisement for bids for dredging, which contract the relator claimed to have entered into with the secretary, so as to render it enforceable. The Supreme Court refused to consider any question as to whether the contract was to be regarded as complete or as to the authority of the secretary of war in the premises, because it appeared that at the time when the application for the mandamus was made the relator had voluntarily entered into a second contract to do the same work at a lower price and on different terms, and had already been paid on account thereof. "Even if the writ of mandamus could be so perverted as to make it serve the purposes of an ordinary suit," said Mr. Justice WHITE, "the relator is in no position to avail himself of such relief. He entered of his own accord into the second contract, and has acted under it and has taken advantages which resulted from its action under it, having received the compensation which was to be paid under its terms. Having done all this he is estopped from denying the validity of the contract. (Citing *Oregonian R. Co. v. Oregon R. & N. Co.*, 10 Sawyer, 464.) Nor does the fact that in making his second contract the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences."

As was said by the Supreme Court of Alabama in *Robinson v. Peabworth* (71 Ala. 240), estoppel in a case of this character "simply means that you shall not take the fruits of an illegal transaction and afterwards set the transaction aside as illegal." In holding that the plaintiff here is precluded from attacking the plan and lease in question by reason of his sale of the privileges acquired by him thereunder as a stockholder in the Metropolitan Railway Company, we do not pass upon the legality of the scheme, either to condemn or approve it; we simply decide that, even assuming it to be as unlawful as he alleges, he is in no position to assail it.

This defence is available to the respondents notwithstanding the fact that the plaintiff did not sell his privileges until after the beginning of the suit. Matters which arise between the bill and plea may be pleaded in equity. (*Turner v. Robinson*, 1 Simons & Stuart, 3.) Under the old chancery system in this state there was no rule of equity

pleading whereby a defendant was precluded from availing himself of matters arising between the filing of the bill and answer, by way of avoidance or defence. (*Lyon v. Brooks*, 2 Edw. Ch. 110.) Nor is there any such prohibition under the Code. (See *Beebe v. Dowd*, 22 Barb. 255, 259.) As was said by the late Mr. Justice HARDIN in *Mann v. City of Utica* (44 How. Pr. 334, 339): "It is a familiar rule in equity cases which permits courts to take into consideration subsequent events happening after the commencement of the action in equity and determining what relief shall be granted, especially where part of the relief asked for is an injunction from the court to restrain parties."

For the reasons which have been stated, and without considering or deciding the other questions discussed by counsel, we conclude that this judgment should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

*Judgment affirmed.*

(1) *Rights of Persons who became Shareholders at a Time subsequent to the Commission of the Alleged Wrong.* *not debated here*

See n 507

WINSOR v. BAILEY.

[even if he had to qualify to sue]  
Sealed & transmitted 45 N.V. 1068

1875. 55 New Hampshire, 218<sup>1</sup>

481 P. 1047, (Mass.)

BILL in equity by Winsor *et als.* against the Hooksett M'fg Co., and various individuals; alleging that certain monies of the company have been wrongfully paid over to some of the defendants; and praying that the recipients may be decreed to repay the same to the corporation. The bill alleges that the plaintiffs are owners of stock in the company, and sets out specifically the number of shares owned by each; but does not allege that they were owners of stock at the time of the payments complained of. Defendants demurred.

this bill does not show that the plaintiff was owner of share at time, hence no complaint of - Nelson needs!

*Mugridge*, for plaintiffs.

*Fowler and Tappan*, for defendants.

LADD, J.

2. The bill alleges that the plaintiffs are owners of stock, and sets out specifically the amount owned by each. It is contended for the defendants that the bill is defective in not showing that they were owners of stock at the time of the alleged wrongful payment to some or all of the defendants. No authority is referred to in support of this position, and I see no sound reason upon which it can be sustained. To hold so, would seem to involve the singular consequence that the transfer of stock in a corporation extinguishes the right to inquire into the previous fraudulent conduct of its officers, whereby its funds have been misappropriated.

Reason

CUSHING, C. J., concurred.

SMITH, J. 2. The plaintiffs allege that they are stockholders in the Hooksett Manufacturing Company, and specify the number of shares owned by each, but do not allege that they were stockholders at the time the dividend was paid the defendants. But that is not necessary, and it is immaterial whether they were or not. The transfer of the stock conveyed to them not only the ownership of the shares and the right to the future dividends thereon, but also placed them on an equal footing with the other stockholders in respect to the right to call the officers and agents of the corporation to an account for their fraudulent conduct.

D, 82 (3)

<sup>1</sup> Only so much of the case is given as relates to one point. — Ed.

21 JUL 1915

## PARSONS v. JOSEPH.

1890. 92 Alabama, 403.<sup>1</sup>

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

Sub by shh  
The bill in this case was filed on the 19th day of July, 1890, by Henry Joseph, as a stockholder in the Birmingham, Powderly & Bessemer Street Railroad Company, against the said corporation and J. H. Parsons; and sought the cancellation of certain certificates of stock issued by the corporation to said Parsons, on the ground that the stock was fictitious and fraudulent. There was a demurrer to the bill, and a motion to dissolve the injunction, each of which was overruled; and this appeal is sued out by the defendants from that interlocutory decree.

*Lea & Greene*, for appellants.*White & Howze*, contra.

COLEMAN, J. The purpose of the bill is to have certain certificates of stock issued by the Birmingham, Powderly & Bessemer Street Railroad Co. to defendant Parsons, cancelled, on the ground that the stock is fictitious, and was issued in violation of the Constitution and statute law of the State. The bill prayed an injunction, and the writ was awarded by the chancellor. A demurrer was interposed, and also an answer by the defendant Parsons. The cause was submitted for decree on the demurrer, and upon motion to dissolve the injunction. The court overruled the demurrer, and denied the motion to dissolve the injunction, and from this interlocutory decree the appeal is taken.

Among other averments, the bill substantially alleges that plaintiff is a *bona fide* stockholder in said company; that shortly after the organization of the company, the defendant subscribed for one hundred and seven shares of the capital stock of the company, of the par value of fifty dollars each, and paid for the same in full by conveying to the company thirty-nine acres of land (describing the land) at an agreed price and valuation of one hundred and thirty-seven dollars per acre, when the land was not worth more than twenty-five dollars per acre, and for this land Parsons was to receive one hundred and seven shares of the stock; that shortly thereafter, the capital stock of the company was doubled, and without further consideration than the thirty-nine acres of land, Parsons' stock was doubled, and he received two hundred and fourteen shares of the capital stock. The bill, as amended, charges the excessive valuation of the land was made knowingly, willfully, and with the fraudulent intent of having issued to Parsons the fictitious stock, in violation of law. This is a sufficient statement of the facts for the consideration of the demurrer.

<sup>1</sup> Arguments omitted. — Ed

The demurrer admits the truth of the averments. It is contended, that the bill is defective in not averring that plaintiff was a stockholder at the time of the transaction, complained of as being fraudulent, or that his stock devolved upon him by operation of law.

Demurrer  
n. a shk at  
time.

In the case of *Dimpfell v. Ohio & Miss. R. R. Co.*, 110 U. S. p. 209, relied upon by appellant, it was held, that a stockholder, contesting as *ultra vires* an act of the directors, should aver "that he was a stockholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law." To the same effect was *Hawes v. Oakland*, 104 U. S. 450; and many others might be cited. Upon an examination of these authorities, it will be seen that the principle asserted rests solely upon equity Rule No. 94 adopted by the United States Supreme Court and which may be found in the preface to vol. 104 of U. S. Reports. Morawetz on Private Corporations, speaking of this rule, says, it was evidently designed as a rule of practice merely, and was deemed necessary to guard courts from being imposed upon by collusion of parties. — Morawetz on Priv. Corp., §§ 269, 270. The rule is not a general principle of law, applicable to pleadings in all the courts, and has never been applied to the courts of this State. The demurrer to the bill for failing to make this averment was properly overruled.

Rule. pract  
applic in F. Ct  
only.

The motion to dissolve the injunction was heard upon the sworn bill and answer. The answer denied that plaintiff was a *bona fide* stockholder, and set up that plaintiff was the transferee of one E. Lesser. The answer admits that defendant's stock was doubled without the payment of any additional consideration than that of the land; but by way of explanation and defense, avers that the lands were not truly and properly valued at first, and the increased valuation of the lands only raised them to their real and true value, and the additional issue of stock was for property at its fair valuation. The answer continues, however, as follows: that if said transaction had been illegal and fraudulent, and not done in good faith, complainant is estopped from setting up fraud in said transaction, or seeking to cancel said stock, because E. Lesser, who was complainant's transferrer, participated in all of said transactions and himself fixed the value of said lands, with full knowledge of and after full investigation of the value of said land.

Answer  
Estoppel:  
Rn. for  
participat  
him.

A transferee of stock is not necessarily disqualified as a suitor in all cases, because the prior holders were personally disqualified. If the transferee purchased the shares in good faith, and without notice of the fact that the prior holder had precluded himself from suing, he would have as just a title to relief, as if he had purchased from a shareholder who was under no disability; but, if the purchaser was aware that the prior holder had barred his right to relief, neither justice nor public policy would require that the transferee, under these circumstances, should be accorded any greater rights than his transferrer. — Morawetz, *supra*, § 267.

Rule. parties  
of for bar  
one ckr but  
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The same rule prevails in this State in favor of derivative purchasers.



If a claimant was a *bona fide* purchaser, without notice of a fraud, or of facts which the law considers sufficient to establish it, or from which it is inferable, then he could not be affected by notice to his vendor. — *Horton v. Smith*, 8 Ala. 78; *Fenno v. Sayre*, 8 Ala. 458; *Weer v. Davis*, 4 Ala. 442; *Martinez v. Lindsey*, 91 Ala. 334; Wait on Insol. Cor., §§ 628, 630.

If a stockholder participates in a wrongful or fraudulent contract, or silently acquiesces until the contract becomes executed, he can not then come into a court of equity, to cancel the contract, and more especially, if the company, or himself, as a stockholder, has reaped a benefit from the contract; and this rule holds good, although the consideration of the contract may be one expressly prohibited by statute. The same disability would attach to the transferee of his stock who bought with notice. We consider this general rule of equity abundantly sustained. — Morawetz on Priv. Corp., §§ 261, 262; Cook on Stock and Stockholders, §§ 39, 40, 735; *Wright v. Hughes*, 12 Amer. St. Rep. 413. It is sustained by the familiar rule, that he who invokes the aid of a court of equity must have clean hands. Mr. Cook states the conditions upon which a stockholder can sustain a suit to remedy the frauds, *ultra vires* acts or negligence of directors, to be, *first*, the acts complained of must be such as to amount to a breach of trust, and such as neither a majority of the directors nor of the stockholders can ratify or condone; *second*, that the complaining stockholder himself is free from *laches*, acquiescence of the acts to remedy which the suit is brought; *third*, that the corporation has been requested and refused or neglected to institute the suit, that the suit is instituted by *bona fide* stockholders as complainants, and that the corporation and the guilty parties, and other proper parties have been made defendants. Cook, *supra*, § 646.

If the averments of the bill are sustained by proof, the stock issued to the defendants was in violation of section 1662 of the Code and of section 6, Article XIV of the Constitution. On the contrary, if the proof shows that the property was received in payment of stock, at a fair valuation, such would not be the result. — *Davis Bros. v. Montgomery Fur. & Chem. Co.*, at present term.

In cases where the stockholders of the company by any *laches*, acquiescence, or participation in the unlawful and fictitious issue of stock or for any other sufficient cause are precluded from instituting the proper proceedings, to remedy the wrong, the remedy is still open to the State to institute all necessary and proper proceedings to vacate and dissolve the corporation, or have such other proper judgment and decree rendered, as the proof and justice may demand.

It may be, that stockholders, who knowingly and intentionally have subscribed and paid for stock with property upon a fictitious valuation, are liable as stockholders who have not paid up in full for their stock, within the meaning of the statute, to creditors who have not precluded themselves from maintaining the suit. — Wait, *supra*, § 593; *Douglas v. Ireland*, 73 N. Y. 100; *Boynton v. Andrews*, 63 N. Y. 93.

Genl. statement  
of rule.

x By the way have fully approp<sup>d</sup> \$4,000 of the corp funds wh<sup>ch</sup> sh<sup>d</sup> be restore<sup>d</sup>  
to the 1st of fail to see why they have n. a c/a to compel such return  
even if they acq<sup>d</sup> their shares after such misapp<sup>r</sup> of \$64 etc 102 P 381  
complainant showed ref was a shh at commencement actn but deb<sup>t</sup> shown wh<sup>ch</sup>  
he acq<sup>d</sup> by purch<sup>ing</sup> TRIMBLE v. AMERICAN SUGAR REFINING CO. 569  
one who was a shh at time called for d<sup>iv</sup> by subscription to l<sup>et</sup> But that  
immaterially 2637

Applying the rule of law applicable when a motion to dissolve an injunction is submitted upon bill, exhibits, and answer, and considering only so much of the answer as is responsive to the bill, we are of opinion that the decretal order, overruling the demurrers and motion to dissolve the injunction, is free from error.

Affirmed.

The case of *Downey v. Joseph* was affirmed on the authority of the above case. Can<sup>d</sup>. collected AmC. 72, 1100 of 17 C. App 35363 v<sup>x</sup> Harvey. Thus

life can maintain a such shh bill on acct. any trans<sup>action</sup> in wh<sup>ch</sup> for  
TRIMBLE v. AMERICAN SUGAR REFINING CO. has acquiesced.

1901. 61 N. J. Eq. 340.

PITNEY, V. C. The cause of action attempted to be shown in the complainant's bill may be divided as follows: *First*, that the acts of the defendant in going into the coffee trade are *ultra vires*, in that they are not warranted by the objects of the corporation as set forth in the articles of association or certificate of incorporation; *second*, that the defendant has a large surplus in funds not necessary for use in its legitimate business, which it ought to divide and refuses to divide; *third*, that it has concealed its true situation from its stockholders, and *fourth*, that it is carrying on the sugar trade and coffee trade in competition with a corporation known as Arbuckle Brothers, for the purpose of driving that corporation to unite and consolidate with the complainant; and that such action is contrary to public policy, and may result in the destruction of the defendant's corporate rights.

It is to be observed that the complainant is the holder of one seven hundred and fortieth part of the capital stock of the company, a trifle less than one-seventh of one per cent of the whole issue; and it does not appear that any other stockholder is dissatisfied with the conduct of the business of the company in respect to the matters complained of by the bill.

Admitting that the holder of so small a part of the stock is entitled to be heard in this court for the correction of any real grievance he may suffer by the misconduct of the majority, yet I think it the duty of the court to require that he should show a clear case by distinct affirmative allegations, even if they should necessarily include some of a negative character. In short, he must anticipate and exclude all reasonably probable conditions which may bar his relief.

With this preliminary observation, I further remark that the bill does not state at what time complainant acquired the one hundred shares of stock which he holds, and it is common knowledge that the stock of this company, and many others of the same class, is daily dealt in on the Exchange. For aught that appears, he may have acquired it a very short time before the filing of the bill, from a holder who had acquiesced in everything that the company had done up to that time and in the policy the carrying out of which the complainant

seeks to enjoin. That such acquiescence would bar the original holders of the shares now held by the complainant, if he knew of it, is perfectly well settled. It is necessary, on this point, only to refer to the case of *Rabe & Cross v. Dunlap*, 6 Dick. Ch. Rep. 40. And it seems to me that where a person holding so small a fraction of the capital stock as the complainant represents here asks to interfere with a particular phase of the management of the corporation, which is presumably satisfactory to all the other stockholders, he ought to show affirmatively that neither he nor his predecessor in title has acquiesced in the policy of which he now complains, for I think he would be bound by the acquiescence of his predecessor in title. 4/189.

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Parsons, Stans 14, Able NC 419. 4335.; 86-2-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100-101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-1073-1074-1075-1076-1077-1078-1079-1080-1081-1082-1083-1084-1085-1086-1087-1088-1089-1090-1091-1092-1093-1094-1095-1096-1097-1098-1099-1100-1101-1102-1103-1104-1105-1106-1107-1108-1109-1110-1111-1112-1113-1114-1115-1116-1117-1118-1119-1120-1121-1122-1123-1124-1125-1126-1127-1128-1129-1130-1131-1132-1133-1134-1135-1136-1137-1138-1139-1140-1141-1142-1143-1144-1145-1146-1147-1148-1149-1150-1151-1152-1153-1154-1155-1156-1157-1158-1159-1160-1161-1162-1163-1164-1165-1166-1167-1168-1169-1170-1171-1172-1173-1174-1175-1176-1177-1178-1179-1180-1181-1182-1183-1184-1185-1186-1187-1188-1189-1190-1191-1192-1193-1194-1195-1196-1197-1198-1199-1200-1201-1202-1203-1204-1205-1206-1207-1208-1209-1210-1211-1212-1213-1214-1215-1216-1217-1218-1219-1220-1221-1222-1223-1224-1225-1226-1227-1228-1229-1230-1231-1232-1233-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1895, Bigelow paid Simpson's executors for their stock on behalf of the syndicate, in cash and notes of himself and Lewisohn, and in June Keyser was paid in the same way.

On July 8, 1895, Bigelow and Lewisohn started the plaintiff corporation, the seven members being their nominees and tools. The next day the stock of the company was increased to 150,000 shares of twenty-five dollars each, officers were elected, and the corporation became duly organized. July 11, pursuant to instructions, some of the officers resigned, and Bigelow and Lewisohn and three other absent members of the syndicate came in. Thereupon an offer was received from the Baltimore company, the stock of which had been bought, as stated, by Bigelow and Lewisohn, to sell substantially all its property for 100,000 shares of the plaintiff company. The offer was accepted, and then Lewisohn offered to sell the real estate now in question, obtained from Keyser, for 30,000 shares, to be issued to Bigelow and himself. This also was accepted and possession of all the mining property was delivered the next day. The sales "were consummated" by delivery of deeds, and afterwards, on July 18, to raise working capital, it was voted to offer the remaining 20,000 shares to the public at par, and they were taken by subscribers who did not know of the profit made by Bigelow and Lewisohn and the syndicate. On September 18, the 100,000 and 30,000 shares were issued, and it was voted to issue the 20,000 when paid for. The bill alleges that the property of the Baltimore company was not worth more than \$1,000,000, the sum paid for its stock, and the property here concerned not over \$5,000, as Bigelow and Lewisohn knew. The market value of the petitioner's stock was less than par, so that the price paid was \$2,500,000, it is said, for the Baltimore company's property and \$750,000 for that here concerned. Whether this view of the price paid is correct, it is unnecessary to decide. (with 40 shares)

Of the stock in the petitioner received by Bigelow and Lewisohn or their Baltimore corporation, 40,000 shares went to the syndicate as profit, and the members had their choice of receiving a like additional number of shares or the repayment of their original subscription. As pretty nearly all took the stock, the syndicate received about 80,000 shares. The remaining 20,000 of the stock paid to the Baltimore company, Bigelow and Lewisohn divided, the plaintiff believes, without the knowledge of the syndicate. The 30,000 shares received for the property now in question they also divided. Thus the plans of Bigelow and Lewisohn were carried out. \$2,500,000

The argument for the petitioner is that all would admit that the promoters (assuming the English phrase to be well applied) stood in a fiduciary relation to it, if, when the transaction took place, there were members who were not informed of the profits made and who did not acquiesce, and that the same obligation of good faith extends down to the time of the later subscriptions, which it was the promoters' plan to obtain. It is an argument that has commanded the assent of at

least one court, and is stated at length in the decision. But the courts do not agree. There is no authority binding upon us and in point. The general observations in *Dickerman v. Northern Trust Co.*, 176 U. S. 181, were *obiter*, and do not dispose of the case. Without spending time upon the many dicta that were quoted to us, we shall endeavor to weigh the considerations on one side and the other afresh.

The difficulty that meets the petitioner at the outset is that it has assented to the transaction with the full knowledge of the facts. It is said, to be sure, that on September 18, when the shares were issued to the sellers, there were already subscribers to the 20,000 shares that the public took. But this does not appear from the bill, unless it should be inferred from the ambiguous statement that on that day it was voted to issue those shares "to persons who had subscribed therefor," upon receiving payment, and that the shares "were thereafter duly issued to said persons," etc. The words "had subscribed" may refer to the time of issue and be equivalent to "should have subscribed" or may refer to an already past event. But that hardly matters. The contract had been made and the property delivered on July 11 and 12, when Bigelow, Lewisohn and some other members of the syndicate held all the outstanding stock, and it is alleged in terms that the sales were consummated before the vote of July 18 to offer the stock to the public had been passed.

At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. *Salomon v. Salomon & Co.* [1897], A. C. 22; *Blum v. Whitney*, 185 N. Y. 232; *Tompkins v. Sperry*, 96 Maryland, 560. If there was a wrong it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation *nun pro tunc*, but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers' position and the promoter's invitation that the corporation has any pretence for a standing in court. If the promoters after starting their scheme had sold their stock before any subscriptions were taken, and then the purchasers of their stock with notice had invited the public to come in and it did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now.

But it is said that from a business point of view the agreement was not made merely to bind the corporation as it then was, with only forty shares issued, but to bind the corporation when it should have a capital of \$3,750,000; and the implication is that practically this was a new and different corporation. Of course, legally speaking, a corporation does not change its identity by adding a cubit to its stature.

The nominal capital of the corporation was the same when the contract was made and after the public had subscribed. Therefore what must be meant is, as we have said, that the corporation got a new right from the fact that new men who did not know what it had done had put in their money and had become members. It is assumed in argument that the new members had no ground for a suit in their own names, but it is assumed also that their position changed that of the corporation, and thus that the indirect effect of their acts was greater than the direct; that facts that gave them no claim gave one to the corporation because of them, notwithstanding its assent. We shall not consider whether the new members had a personal claim of any kind, and therefore we deal with the case without prejudice to that question, and without taking advantage of what we understand the petitioner to concede.

But, if we are to leave technical law on one side and approach the case from what is supposed to be a business point of view, there are new matters to be taken into account. If the corporation recovers, all the stockholders, guilty as well as innocent, get the benefit. It is answered that the corporation is not precluded from recovering for a fraud upon it, because the party committing the fraud is a stockholder. *Old Dominion Copper Mining and Smelting Co. v. Bigelow*, 188 Massachusetts, 315, 327. If there had been innocent members at the time of the sale, the fact that there were also guilty ones would not prevent a recovery, and even might not be a sufficient reason for requiring all the guilty members to be joined as defendants in order to avoid a manifest injustice. *Stockton v. Anderson*, 40 N. J. Eq. 486. The same principle is thought to apply when innocent members are brought in later under a scheme. But it is obvious that this answer falls back upon the technical diversity between the corporation and its members, which the business point of view is supposed to transcend, as it must, in order to avoid the objection that the corporation has assented to the sale with full notice of the facts. It is mainly on this diversity that the answer to the objection of injustice is based in *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 114, 122.

Let us look at the business aspect alone. The syndicate was a party to the scheme to make a profit out of the corporation. Whether or not there was a subordinate fraud committed by Bigelow and Lewisohn on the agreement with them, as the petitioner believes, is immaterial to the corporation. The issue of the stock was apparent, we presume, on the books, so that it is difficult to suppose that at least some members of the syndicate, representing an adverse interest, did not know what was done. But all the members were engaged in the plan of buying for less and selling to the corporation for more, and were subject to whatever equity the corporation has against Bigelow and the estate of Lewisohn. There was some argument to the contrary, but this seems to us the fair meaning of the bill. Bigelow and Lewisohn, it is true, divided the stock received for the real estate now in ques-

tion. But that was a matter between them and the syndicate. The real estate was bought from Keyser by the syndicate, along with his stock in the Baltimore company, and was sold by the syndicate to the petitioner along with the Baltimore company's property, as part of the scheme. The syndicate was paid for it, whoever received the stock. And this means that two-fifteenths of the stock of the corporation, the 20,000 shares sold to the public, are to be allowed to use the name of the corporation to assert rights against LewisoHN's estate that will enure to the benefit of thirteen-fifteenths of the stock that are totally without claim. It seems to us that the practical objection is as strong as that arising if we adhere to the law.

Let us take the business point of view for a moment longer. To the lay mind it would make little or no difference whether the 20,000 shares sold to the public were sold on an original subscription to the articles of incorporation or were issued under the scheme to some of the syndicate and sold by them. Yet it is admitted, in accordance with the decisions, that in the latter case the innocent purchasers would have no claim against any one. If we are to seek what is called substantial justice in disregard of even peremptory rules of law, it would seem desirable to get a rule that would cover both of the almost equally possible cases of what is deemed a wrong. It might be said that if the stock really was taken as a preliminary to selling to the public, the subscribers would show a certain confidence in the enterprise and give at least that security for good faith. But the syndicate believed in the enterprise, notwithstanding all the profits that they made it pay. They preferred to take stock at par rather than cash. Moreover, it would have been possible to issue the whole stock in payment for the property purchased, with an understanding as to 20,000 shares.

Of course, it is competent for legislators, but not, we think, for judges, except by a *quasi*-legislative declaration, to establish that a corporation shall not be bound by its assent in a transaction of this kind, when the parties contemplate an invitation to the public to come in and join as original subscribers for any portion of the shares. It may be said that the corporation cannot be bound until the contemplated adverse interest is represented, or it may be said that promoters cannot strip themselves of the character of trustees until that moment. But it seems to us a strictly legislative determination. It is difficult, without inventing new, and qualifying established doctrines, to go behind the fact that the corporation remains one and the same after once it really exists. When, as here, after it really exists, it consents, we at least shall require stronger equities than are shown by this bill to allow it to renew its claim at a later date because its internal constitution has changed.

To sum up: In our opinion, on the one hand, the plaintiff cannot recover without departing from the fundamental conception embodied in the law that created it; the conception that a corporation remains

unchanged and unaffected in its identity by changes in its members. *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273; *Salomon v. Salomon & Co.* [1897], A. C. 22, 30. On the other hand, if we should undertake to look through fiction to facts, it appears to us that substantial justice would not be accomplished, but rather a great injustice done, if the corporation were allowed to disregard its previous assent in order to charge a single member with the whole results of a transaction to which thirteen-fifteenths of its stock were parties, for the benefit of the guilty, if there was guilt in any one, and the innocent alike. We decide only what is necessary. We express no opinion as to whether the defendant properly is called a promoter, or whether the plaintiff has not been guilty of laches, or whether a remedy can be had for a part of a single transaction in the form in which it is sought, or whether there was any personal claim on the part of the innocent subscribers, or as to any other question than that which we have discussed.

The English case chiefly relied upon, *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, affirming s. c., 5 Ch. D. 73, seems to us far from establishing a different doctrine for that jurisdiction. There, to be sure, a syndicate had made an agreement to sell, at a profit, to a company to be got up by the sellers. But the company, at the first stage, was made up mainly of outsiders, some of them instruments of the sellers, but innocent instruments, and, according to Lord Cairns, the contract was provisional on the shares being taken and the company formed (p. 1239). There never was a moment when the company had assented with knowledge of the facts. The shares, with perhaps one exception, all were taken by subscribers ignorant of the facts, 5 Ch. D. 113, and the contract seems to have reached forward to the moment when they subscribed. As it is put in 2 *Morawetz, Corp* (2d ed.) § 292, there was really no company till the shares were issued. Here thirteen-fifteenths of the stock had been taken by the syndicate, the corporation was in full life and had assented to the sale with knowledge of the facts before an outsider joined. There most of the syndicate were strangers to the corporation, yet all were joined as defendants (p. 1222). Here the members of the syndicate, although members of the corporation, are not joined, and it is sought to throw the burden of their act upon a single one. *Gluckstein v. Barnes* [1900], A. C. 240, certainly is no stronger for the plaintiff, and in *Yeiser v. United States Board & Paper Co.*, 107 Fed. Rep 340, another case that was relied upon, the transaction equally was carried through after innocent subscribers had paid for stock.

*Decree affirmed.*<sup>1</sup>

<sup>1</sup> In *Old Dominion Copper Co. v. Bigelow*, 188 Mass. 315, the court said, p. 327: Again, the corporation is not barred because when the agreement was made it acquiesced in the trade and it was then, from a legal point of view, fully born. That was equally true in *Hayward v. Leeson* and the cases cited in that case. The answer to that suggestion is that from a business point of view the agreement was not made to bind the corporation with a capital of \$1000 which was the corporation then in fact in existence, but to bind the corporation



with a capital of \$3,750,000. It was to that corporation with a capital of \$3,750,000 that a full disclosure ought to have been made, and to that corporation no disclosure ever was made.

On the case stated in this bill the defendant was a promoter of the plaintiff corporation; being a promoter he stood in a fiduciary relation to it; on selling to the plaintiff the real estate here in question he was bound to disclose all facts known to him material in the sale since it was not independently represented; the price at which the property recently had been bought with a view to reselling it to the plaintiff corporation was at any rate a material fact which he was bound to disclose; the knowledge of the defendant and Lewisohn was not equivalent to a disclosure to the plaintiff corporation, although they owned all the stock of the plaintiff corporation outstanding at the time the sale was made; and although fifty-six thousand out of one hundred and fifty thousand shares of the capital stock ultimately issued were issued to them; the defendant violated the duty which he owed the plaintiff in not disclosing that fact; and for this reason the contract here in question was not binding on the plaintiff.

146/184

Review *Earlanger* ca. 399.

*in re Ambrose Lake Co.* 14 Ch D 390.

*Pawson v Hayes* 14 Abb. N. C. 419.

*Munn v. Whitney* 185 N. Y. 232, 77 N. E. 1159

*Mason v. Carrothers*. 74 At. 1030.

89 N. E. 195 1007 also rep'd in this case - O. & C. C. 1

cf note to *Florida Co.* 18 LRAns 1106

Article 12 del LR 57

Note 8 Col LR 567

" 38 U. S. P. 226

" 70 Cal. 219-221.

22 ALR 48

1. 57. 375 at 377 + 23 + 65. 7. 74 Q 1030.6

146/184. *Garnett v. Pac. C. & O. Co.* Subtitle to set aside issue reamed  
shares issued to certn of Corp & no other shk all the org. incorp  
owners, all issued stock voted to issue 68000 shs to one Certn for  
certn option owner of him to keep some, give some of the exan  
to ea. of the Certn in Co. Held P. of who came in later by purch of Certn  
induced he alleged of misrep<sup>n</sup> by earlier shk as price they p<sup>d</sup>  
for them stock cant sue on b<sup>y</sup> Corp. If P. was misled to his  
injury by subseq false rep<sup>n</sup> of s<sup>o</sup> the fact cdn affect Corp.  
It is remedy 1/one pers<sup>o</sup> to re. inst in name & for the benefit  
of Corp whose Corp trans<sup>n</sup> was valid when made 189.

## CHAPTER IV.

### CREDITORS.

(A) *Fraudulent Conveyances. - Fact - same as in case of natural persons*  
*cf 106 N.Y. 252*

55 HURD v. NEW YORK AND COMMERCIAL STEAM  
LAUNDRY CO.

1901. 167 New York, 89.<sup>1</sup>

THE defendant company was incorporated Nov. 3, 1890. Thereupon a corporation referred to as the Commercial Company and an unincorporated concern referred to as the New York Company were consolidated with the defendant corporation; and the business previously conducted by the two former companies was taken over and continued by the defendant. April 30, 1891, the plant and machinery of the Commercial Company, valued at \$20,000, were transferred to the defendant for a consideration of \$20,000, to be paid in the capital stock of the defendant corporation, which was ultimately to be distributed among the stockholders of the Commercial Company. This transfer of the plant and machinery of the Commercial Company was not made in the usual course of business. The effect of such transfer was to terminate the regular business of that company, and it was made and accepted by the defendant for that purpose.

Prior to the so-called consolidation the Commercial Company was indebted to Eliza N. Hall on a disputed claim, upon which judgment was obtained against that company, on Aug. 9, 1893, for \$4,381.16. Execution issued thereon was returned unsatisfied. Thereafter an action was brought by Hall, as judgment creditor, against the Commercial Company for the sequestration of its property, and a judgment was had therein appointing the present plaintiff receiver of said company. This action is brought by the plaintiff, as such receiver, to compel an accounting by the defendant as to the assets received by it from the Commercial Company and to recover a money judgment.

The foregoing are a portion of the facts found by the trial court, upon which it predicated the legal conclusions that the transfer by the Commercial Company was fraudulent and void against its creditors and against the plaintiff; also that the defendant corporation was chargeable with notice of the existence of the claim of Hall and took the assets of the Commercial Company charged with all its debts.

The trial court directed judgment in favor of the plaintiff for the amount of the Hall judgment and costs. This judgment was reversed in the Appellate Division by a divided court. Plaintiff appealed.

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

*of took over prop  
Comm Co 1207  
+ gave for the 207  
shares held by  
among stock  
Comm Co  
therefor as  
in evidence, but  
but to end up  
Comm Co.*

*Comm Co then  
owed Hall who  
after. If it  
after it was  
then applied  
for rec.  
Rec. as of here  
act. acc. q.*

corp on rev. bty can't go away w assets. 103 US 498. Sale of intst btyden or deft and  
is void. 93 8878 But a sale w/ corp course. but to a bff m n? cannot be set aside  
94 Tex 421 even tho it be a sale. all corp assets 72 Jo 666  
Preference of a Cr valid in Cal 83 432. Civil Code -  
578 HURD v. NEW YORK AND COMMERCIAL STEAM LAUNDRY CO.

Edwin C. Dusenbury, for appellant.  
W. W. Westervelt and Delos McCurdy, for respondent.  
WERNER, J.

Wing Co sold it  
want to have  
the stock  
the rolling mill  
the machinery  
the stock  
the rolling mill  
the machinery  
the stock

Stripped of all speculations and assumptions we have here the case of a corporation which is in debt. While so indebted its officers enter into an agreement under which substantially all of its assets are transferred to another corporation which is thereafter to continue the business. In payment of this transfer the purchasing corporation issues some of its capital stock, not to the selling corporation, nor yet to its officers as trustees, but to the principal stockholder as an individual. When the creditor undertakes to assert his rights the stock is reissued to the late treasurer of the selling corporation, who has become the president of the purchasing corporation, and he distributes the same without regard to the claims of creditors. This is the transaction which is sought to be defended under the authority of *H. & G. M. Co. v. H. & W. M. Co.* (127 N. Y. 252). A mere glance at that case will suffice to emphasize the difference between it and the case at bar. There the question was, primarily, whether the plaintiff could recover upon a promissory note which it took in payment for stock of the defendant corporation, in consideration of the transfer to the latter of the rolling mill, machinery, etc., of the former, and, incidentally, whether the taking of this stock was *ultra vires* under a charter which provided that "it shall be unlawful for such company to use any of its funds in the purchase of any stock in any other corporation." (Laws 1848, chap. 40, sec. 8.) It was held that the plaintiff could recover, as the transaction was not *ultra vires*, because the statute did not forbid the taking of stock in payment of a debt, and also, that if it were *ultra vires* the defendants were in no position to interpose a plea. The statement in the opinion in that case, to the effect that a corporation has power, with the consent of all of its stockholders, to sell its plant to another corporation and to retire from business, taking payment in the stock of the other corporation, was entirely correct as qualified by the facts before the court. No rights of creditors intervened, the stockholders had all consented, and the question arose between the parties to a promissory note given for some of the stock. Here we have an entirely different condition of things. The stockholders consent but the creditor objects. When he demands payment of his claim he is referred to the empty shell which is all that is left of the live corporation whose tangible assets constituted a trust fund for the payment of his debt at the time of its creation. When he seeks to follow this fund he is told that the capital stock of the defendant in the hands of those who may be *bona fide* holders is his only resort. This is not the law. In the recent case of *Cole v. M. I. Co.* (133 N. Y. 164) this court decided that a transaction similar to the one under review was illegal as against creditors. In that case the plaintiff was a creditor of the

22/375. It is by one Corp its land and all its bus assets to a 2<sup>nd</sup> Co who con-  
The new Co have same obj<sup>t</sup> purp & place, but is inf<sup>r</sup> & crs. "It is true & the  
it didn't find by any actual fd in the trans<sup>r</sup>; but true think such a fd  
as to the older of a case easily obgn is construch ref<sup>d</sup> first as a matter  
of law. The parties may have ag<sup>d</sup>, no doubt did so, that trans<sup>r</sup> was a  
legal & valid one but in so actg they acted at their peril

acc. but repudiated 7th by as a basis. 118 N. Y. 456 (2d). - Held inapt. actual  
intent that this is former of also. 133 N. Y. 164. - Cases cited in 27th 522

HURD v. NEW YORK AND COMMERCIAL STEAM LAUNDRY CO. 579

National Mining Company. During the pendency of an action to establish the claim of the former the latter transferred all its property and assets to the defendant, the Millerton Iron Company, which promptly executed a mortgage covering all of its property, so that when the plaintiff obtained his judgment and issued his execution he found nothing to levy upon. In that case the defendant trust company, which took the mortgage in good faith and, therefore, occupied a much better position than the defendant herein, appealed to this court from the order of the Appellate Division reversing the judgment dismissing the complaint. In dismissing the rights of the parties, Judge Finch, speaking for this court, said: "As against the creditor the transfer to the Millerton Company was illegal and in fraud of his rights. The assets of a corporation are a trust fund for the payment of its debts, upon which the creditors have an equitable lien, both as against stockholders and all transferees, except those purchasing in good faith and for value. (*Bartlett v. Drew*, 57 N. Y. 587; *Brum v. M. M. Ins. Co.*, 16 Fed. Rep. 143; *Morawetz on Corp.* sec. 791.) The Millerton Company was not such a purchaser. It parted with nothing. It knew and participated in the illegal purpose to destroy the National Company, to make it utterly insolvent, and to deprive its creditors of the trust fund upon which they had the right to rely, and so they were at liberty to set aside the transfer so far as it barred their remedy, and to enforce their equitable lien upon the property in the hands of the transferee." The only difference between the transferee in that case and in this, is that there it gave up nothing except its promise to pay the indebtedness of the transferor, and here it gave up stock, not to the transferor, but to an individual stockholder who did not undertake to pay the corporate debts. Neither became a purchaser for value under such circumstances. Other authorities might be referred to in support of the position above outlined, but the case just cited is so directly in point that a further discussion seems useless.

The order of the Appellate Division should be reversed and the judgment of the Special Term affirmed, with costs in all courts.

CCC 3429 - 45. Not instruments <sup>Ordered accordingly.</sup> 122/373 acc

3439 Every transf. prop or charge thereon made, every oblign incurred, every process taken & intent to delay or defraud any cr or other person of his demands is void & all crs & their successors in int. & vs any person upon whom & c. & d. devolves interest for benefit & others have & dr.

3440 Certain transf. presumed prob. - -

3441. A cr can avoid act or oblign. his dr for prob of where & prob abstracts & defunct legal process. his right to take prop affected by transf or oblign.

3442. Small estate act of 12 27 or 8. c. provisions. This title except as provided in 3440 c. gn. prob intent is one fact & n. law; no can any transf or charge be avoided prob solely on c. f. & it was n. made for a b. & credn; provides however that any transf or encumbrance prop made or from voluntary or as a b. credn by a party while insolvent or in contempt of insol. & shall be prob. void as to said crs. - cf 122/373 preced p

3449-73. As to prob for benefit. Crs. - Prob. forbidden. medium. ibid

Lab. Shs to Crown unp'd stock 66 Cent 44-31 '88  
 Present Status, J.F. Dy. 8 Col R 303-06.  
 Rts. Cr. in Corp assets 22 J.F. R 523-4

580  
 non assess & stock assess m'd up to 100. 100 528  
 SAWYER v. HOAG

(B) Right to have Shares paid up, regardless of Agreements by the Corporation with the Shareholders to the Contrary.

cf 130 P. 90. (Cal App.)

SAWYER v. HOAG.

1873. 17 Wallace (U. S.), 610.<sup>1</sup>

APPEAL from the U. S. Circuit Court for the Northern District of Illinois.

Co was inc Co.  
 Cap was 100,000  
 of wh n  $\frac{1}{10}$  was  
 (p'd in + rest secured)  
 Subse. p'd 15% cash  
 rest secured m't  
 + got 85% back in  
 cash as a loan to Co

Bill in equity by Sawyer against Hoag, assignee of the Lumberman's Insurance Company of Chicago, to enforce an alleged right of set-off. In 1865 the company was incorporated and authorized to begin business on a capital of \$100,000, of which not less than one-tenth should be paid in, the residue to be secured. The directors stated to most of those invited to subscribe that only 15 per cent would be required to be paid down in cash, and that the remaining 85 per cent would be lent back to the subscriber, and a note taken therefor payable in five years, with seven per cent interest, secured by collateral. In 1865 Sawyer, upon the above understanding, subscribed for fifty shares of the par value of \$100 each. He gave his check to the company for \$5000, and his note payable to it in five years for \$4250 (85 per cent of the par value of the stock) with interest; delivered to the company satisfactory collateral security; and received from the company a check for \$4250, by way of, and as for a loan thereof, from the company. He also gave the company authority to sell the securities in case of default in payment of the note or the interest thereon.

Subsequently Sawyer took up the above note, and gave in substitution another note.

The original transaction was treated by the company and by Sawyer as a loan by the company to him, and his stock was treated as fully paid for. At various times after the giving of the note, the company reported to the authorities of the State of Illinois and of other States that its capital stock was fully paid.

<sup>1</sup> Statement abridged. Arguments omitted. — Ed.

In October, 1871, the company was rendered insolvent by the great fire in Chicago.

In January, 1872, Sawyer, having then good reason to believe that the company was insolvent, purchased of one Hayes, for 33 per cent of its par value, a certificate of an adjusted loss for \$5000 against the company. *N.B. Time accg claim as set off*

In June, 1872, a petition in bankruptcy was filed against the company; and, it having been adjudicated a bankrupt, Hoag was appointed its assignee.

*just before* Hoag demanded of Sawyer payment of the note for \$4250. Sawyer insisted that, under Section 20 of the Bankrupt Act, he had a right to set off the certificate of adjusted loss for \$5000. Hoag refused to allow the set-off, and was about to sell the collateral securities in accordance with the authority given by Sawyer to the company. Thereupon Sawyer filed the present bill to enforce the set-off; alleging, among other things, that the note given by him to the company was for money lent to him. The assignee, in his answer, denied that the note was for money lent, and averred that it was in fact for a balance due by Sawyer for his stock subscription which had never been paid. *Sawyer him in a claim vs Co (wh he had bot at 33 on \$) as set off*

The case was submitted to the court below on an agreed statement of facts. That court decreed against the complainant, Sawyer, who appealed to this court.

*D. L. Storey, and C. Hitchcock, for appellant.*

*J. N. Jewett, for appellee.*

MILLER, J. The first and most important question to be decided in this case is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription.

The charter under which the company was organized authorized it to commence business upon a capital stock of \$100,000, with ten thousand paid in, and the remainder secured by notes with mortgages on real estate or otherwise. The transaction by which the appellant professes to have paid up his stock subscription is, shortly, this: He gave to the company his check for the full amount of his subscription, namely, \$5000. He took the check of the company for \$4250, being the amount of his subscription less the 15 per cent. required of each stockholder to be paid in cash, and he gave his note for the amount of the latter check, with good collateral security for its payment, with interest at 7 per cent. per annum. The appellant and the company, by its officers, agreed to call this latter transaction a loan, and the check of the appellant payment in full of his stock; and on the books of the company, and in all other respects as between themselves, it was treated as payment of the subscription and a loan of money. It is agreed that at this time the current rate of interest in Chicago was greater than 7 per cent., and it is not stated as a fact whether these checks were ever presented and paid at any bank, or that any money

Effect vtz. Dr Co  
was to change debt  
stock indebted for loan

was actually paid or received by either party in the transaction. It must, therefore, be treated as an agreement between the corporation, by its officers, on the one part, and the appellant, as a subscriber to the stock of the company, on the other part, to convert the debt which the latter owed to the company for his stock into a debt for the loan of money, thereby extinguishing the stock debt.

OR as 2 parties

Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other if it was found to be mutually convenient to do so. And in any controversy which might or could grow out of the matter between the insurance company and the appellant we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full.

[Assignee in bk. rep. suits party (Co) + also Cr. + Co.]

And on this consideration one of the main arguments on which the appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt.

But ask Cr.

Had the creditors of this insolvent corporation any right to look into and assail the transaction by which the appellant claims to have paid his stock subscription?

Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.

780y-

The principle is fully asserted in two recent cases in this court, namely, *Burke v. Smith*,<sup>1</sup> and in *New Albany v. Burke*.<sup>2</sup> Both these cases turned upon the doctrine we have stated, and upon the necessary inference from that doctrine, that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

In the latter case, a judgment creditor of an insolvent railroad com-

<sup>1</sup> 16 Wallace, 390.

<sup>2</sup> 11 Id. 96.

pany, having exhausted his remedy at law, sought to enforce this principle by a bill in chancery against the stockholders. The court, by affirming the right of the corporation to deal with the debt due it for stock as with any other debt, would have ended the case without further inquiry. But asserting, on the contrary, to its full extent, that such stock debts were trust funds in their hands for the benefit of the corporate creditors, and must in all cases be dealt with as trust funds are dealt with, it was found necessary to go into an elaborate inquiry to ascertain whether a violation of the trust had been committed. And though the court find that the transaction by which the stockholders had been released was a fair and valid one, as founded on the conditions of the original subscription, the assertion of the general rule on the subject is none the less authoritative and emphatic.<sup>1</sup>

In the case before us the assignee of the bankrupt, in the interest of the creditors, has a right to inquire into this conventional payment of his stock by one of the shareholders of the company; and on that inquiry, we are of opinion that, as to these creditors, there was no valid payment of his stock by the appellant. We do not base this upon the ground that no money actually passed between the parties. It would have been just the same if, agreeing beforehand to turn the stock debt into a loan, the appellant had brought the money with him, paid it, taken a receipt for it, and carried it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as valid payment. It is the change of the character of the debt from one of a stock subscription unpaid to that of a loan of money. The debt ceases by this operation, if effectual, to be the trust fund to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose.

And this was precisely what was designed by the parties. It divested the claim against the stockholder of its character of a trust fund, and enabled both him and the directors to deal with it freed from that charge. There are three or four of these cases now before us in which precisely the same thing was done by other insurance companies organized in Chicago, and we have no doubt it was done by this company in regard to all their stockholders.

It was, therefore, a regular system of operations to the injury of the creditor, beneficial alone to the stockholder and the corporation.

We do not believe we characterize it too strongly when we say that it was a fraud upon the public who were expected to deal with them.

The result of it was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred instalments properly secured.

It is said by the appellant's counsel that conceding this, it is still a

<sup>1</sup> See also Curran v. State of Arkansas, 15 Howard, 304; Wood v. Dummer, 3 Mason, 305; Slee v. Bloom, 19 Johnson, 456, and numerous other cases cited by the counsel for the appellees.

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debt due by him to the corporation at the time that he became the owner of the debt due by the corporation to Hayes, and, therefore, the proper subject of set-off under the twentieth section of the Bankrupt Act. That section is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.

The debts must be mutual; must be in the same right.

The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.

It is unnecessary to go into the inquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceeding. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by the stockholder who owed that amount on his subscription.

Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true, that by the power of the legislature there is created in all acts of incorporation a legal entity which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, make loans to them, and in insurance companies, make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be

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subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him.

These principles require the affirmation of the decree in the present case, and it is accordingly *Affirmed.*

Mr. Justice HUNT dissented, holding that the transaction was a loan by the company to the appellant.

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57 HOSPES v. NORTHWESTERN MFG. & CAR CO.

1892. 48 Minnesota, 174.

OPINION by MITCHELL, J.

The principal question in the case is whether the complaint states facts showing that the thrasher company, as creditor, is entitled to the relief prayed for; or, in other words, states a cause of action. Briefly stated, the allegations of the complaint are that on May 10, 1882, Seymour, Sabin & Co. owned property of the value of several million dollars, and a business then supposed to be profitable. That, in order to continue and enlarge this business, the parties interested in Seymour, Sabin & Co., with others, organized the car company, to which was sold the greater part of the assets of Seymour, Sabin & Co. at a valuation of \$2,267,000, in payment of which there were issued to Seymour, Sabin & Co. shares of the preferred stock of the car company of the par value of \$2,267,000, it being then and there agreed by both parties that this stock was in full payment of the property thus purchased. It is further alleged that the stockholders of Seymour, Sabin & Co., and the other persons who had agreed to become stockholders in the car company, were then desirous of issuing to themselves, and obtaining for their own benefit, a large amount of common stock of the car company, "without paying therefor, and without incurring any liability thereon or to pay therefor;" and for that purpose, and "in order to evade and set at naught the laws of this state," they caused Seymour, Sabin & Co. to subscribe for and agree to take common stock of the car company of the par value of \$1,500,000. That Seymour, Sabin & Co. thereupon subscribed for that amount of the common stock, but never paid therefor any consideration whatever, either in money or property. That thereafter these persons caused this stock to be issued to D. M. Sabin as trustee, to be by him distributed among them. That it was so distributed without receipt by him or the car company, from any one, of any consideration whatever, but was given by the car company and received by these parties entirely "gratuitously." The car com-

pany was at this time free from debt, but afterwards became indebted to various persons for about \$3,000,000. The thrasher company, incorporated after the insolvency and receivership of the car company, for the purpose of securing possession of its assets, property, and business, and therewith engaging in and continuing the same kind of manufacturing, prior to October 27, 1887, purchased and became the owner of unsecured claims against the car company, "*bona fide*, and for a valuable consideration," to the aggregate amount of \$1,703,000. As creditor, standing on the purchase of these debts, which were contracted after the issue of this "bonus" stock, the thrasher company files this complaint to recover the par value of the stock as never having been paid for. The complaint does not allege what the consideration of these debts was, nor to whom originally owing, nor what the intervener paid for them, nor whether any of the original creditors trusted the car company on the faith of the bonus stock having been paid for. Neither does it allege that either the thrasher company or its assignors were ignorant of the bonus issue of stock, nor that they or any of them were deceived or damaged in fact by such issue, nor that the bonus stock was of any value. Neither is there any traversable allegation of any actual fraud or intent to deceive or injure creditors. A desire to get something without paying for it, and actually getting it, is not fraudulent or unlawful if the donor consents, and no one else is injured by it; and the general allegation that it was done "in order to evade and set at naught the laws of the state" of itself amounts to nothing but a mere conclusion of law. As a creditor's bill, in the ordinary sense, the complaint is manifestly insufficient. The thrasher company, however, plants itself upon the so-called "trust-fund" doctrine, that the capital stock of a corporation is a trust fund for the payment of its debts; its contention being that such a "bonus" issue of stock creates, in case of the subsequent insolvency of the corporation, a liability on part of the stockholder in favor of creditors to pay for it, notwithstanding his contract with the corporation to the contrary.

This "trust-fund" doctrine, commonly called the "American doctrine," has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules. The doctrine was invented by Justice Story in *Wood v. Dummer*, 3 Mason, 308, which called for no such invention, the fact in that case being that a bank divided up two thirds of its capital among its stockholders without providing funds sufficient to pay its outstanding billholders. Upon old and familiar principles this was a fraud on creditors. Evidently all that the eminent jurist meant by the doctrine

was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders, — a proposition that is sound upon the plainest principles of common honesty. In *Fog v. Blair*, 133 U. S. 534, 541 (10 Sup. Ct. Rep. 338), it is said that this is all the doctrine means. The expression used in *Wood v. Dummer* has, however, been taken up as a new discovery, which furnished a solution of every question on the subject. The phrase that "the capital of a corporation constitutes a trust fund for the benefit of creditors" is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests, — one equitable and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust*, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further. This is well illustrated and clearly announced in the case of *Graham v. La Crosse & M. R. Co.*, 102 U. S. 148. That was a creditors' suit to reach a piece of real estate on the ground that it had been conveyed by the corporation fraudulently for a wholly inadequate consideration. The trust-fund doctrine was invoked by a subsequent creditor, and it was claimed that, as the trust had been violated, the deed should be set aside. If the premise was correct that the corporation held it in trust for creditors, the conclusion was inevitable; but the court denied the premise, saying that a corporation is in law as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same; and that there is no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors any more than a like disposal by an individual; that the same principles of law apply to each. That the phrase that "the capital of a corporation is a trust fund for the payment of its creditors" is misleading, if not inaccurate, is illustrated by the character of the actions that are frequently mistakenly instituted on the strength of it. For example, in the case of *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587 (5 Sup. Ct. Rep. 1081), two roads had been consolidated, the new company acquiring the property of the old ones. A creditor of one of the old companies, on the strength of the "trust-fund" doctrine, claimed a lien on its property in the hands of the new corporation. If this property was impressed with a trust in favor of creditors in the hands of the old company, it would logically follow that it would continue so in the hands of the new one. But the court denied the relief, and, in giving its construction of the "trust-fund"

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doctrine, said: "The property of a corporation is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors is void." This is probably what is meant when it is said in some cases, as in *Clark v. Bever*, 139 U. S. 96, 110 (11 Sup. Ct. Rep. 468), that the capital of a corporation is a trust fund *sub modo*. If so, no one will dispute it. But it means very little, for the same thing could be truthfully said of the property of an individual or a partnership. And obviously it would make no difference whether the disposition of the corporate property is to a stranger or to a stockholder, except that, of course, the latter could not be an innocent purchaser.

There is also much confusion in regard to what the "trust-fund" doctrine applies. Some cases seem to hold that unpaid subscribed capital is a trust fund, while other assets are not, — that is, so long as the subscription is unpaid, it is held in trust by the corporation, but, when once paid in, it ceases to be a trust fund; while other cases hold that, paid or unpaid, it is all a trust fund. The first seems to be the rule laid down in *Sawyer v. Hoag*, 17 Wall. 610, in which the "trust-fund" doctrine was first squarely announced by that court with all the vigor and force characteristic of the great jurist who wrote the opinion. In that case a stockholder in an insurance company had given his note, as the court found the fact to be, for 85 per cent. of his subscription to the stock of the company. After the company had become bankrupt, and the stockholder knew the fact, he bought up a claim against the company for one third its face, and in a suit by the assignee in bankruptcy on his note set up this claim as an offset. That this would have been a fraud on the bankrupt act, and at least a moral fraud on policy holders, is quite apparent without invoking the "trust-fund" doctrine; and, if the note for unpaid stock was a trust fund, there could have been no offset, whether the company was solvent or insolvent. In the opinion it is said that, if the subscription had been paid by the note or otherwise, the note ceased thereby to be a trust fund to which creditors can look, and becomes ordinary assets, with which directors may deal as they choose. But in *Upton v. Tribilcock*, 91 U. S. 45, it is stated: "The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away." While in *Sanger v. Upton*, Id. 56, it is said: "When debts are incurred a contract arises with the creditors that it [the capital] shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied." And in the same connection it is distinctly stated that there is no difference between assets paid in and subscriptions; that "unpaid stock is as much a

part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. *As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation.*" This language is quoted and approved in *County of Morgan v. Allen*, 103 U. S. 498, 508. It would seem clear that this is the correct statement of the law. The capital (not the mere share certificates) means all the assets, however invested. If a subscriber gives his note for his stock, that note is no more and no less a trust fund than the money would have been if he had paid cash down. Capital cannot change from a trust to not a trust by a mere change of form. It is either all a trust or all not a trust, and the "trust-fund" rule, whatever that be, must apply to all alike, and in the same way. If the assets of a corporation are given back to stockholders, the result is the same as if the shares had been issued wholly or partly as a bonus. The latter is merely a short cut to the same result. So with dividends paid out of the capital, voluntary conveyances, stock paid in overvalued property; all are forms of one and the same thing, all reaching the same result (a disposition of corporate assets), which may or may not be a fraud on creditors, depending on circumstances. This much being once settled, the solution of the question when a subsequent creditor can insist on payment of stock issued as paid up, but not in fact paid for, or not paid for at par, becomes, as we shall presently see, comparatively simple.

Another proposition which we think must be sound is that creditors cannot recover on the ground of contract when the corporation could not. Their right to recover in such cases must rest on the ground that the acts of the stockholders with reference to the corporate capital constitutes a fraud on their rights. We have here a case where the contract between the corporation and the takers of the shares was specific that the shares should not be paid for. Therefore, unlike many of the cases cited, there is no ground for implying a promise to pay for them. The parties have explicitly agreed that there shall be no such implication, by agreeing that the stock shall not be paid for. In such a case the creditors undoubtedly may have rights superior to the corporation, but these rights cannot rest on the implication that the shareholder agreed to do something directly contrary to his real agreement, but must be based on tort or fraud, actual or presumed. In England, since the act of 1867, there is an implied contract created by statute that "every share in any company shall be deemed and be taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." This statutory contract makes every contrary contract void. Such a statute would be entirely just to all, for every one would be advised of its provisions, and could conduct himself accordingly. And in view of the fact that "watered" see note at end of page

and "bonus" stock is one of the greatest abuses connected with the management of modern corporations, such a law might, on grounds of public policy, be very desirable. But this is a matter for the legislature, and not for the courts. We have no such statute; and, even if the law of 1873, under which the car company was organized, impliedly forbids the issue of stock not paid for, the result might be that such issue would be void as *ultra vires*, and might be cancelled, but such a prohibition would not of itself be sufficient to create an implied contract, contrary to the actual one, that the holder should pay for his stock.

It is well settled that an equity in favor of a creditor does not arise absolutely and in every case to have the holder of "bonus" stock pay for it contrary to his actual contract with the corporation. Thus no such equity exists in favor of one whose debt was contracted prior to the issue, since he could not have trusted the company upon the faith of such stock. *First Nat. Bank v. Gustin, etc., Mining Co.*, 42 Minn. 327 (44 N. W. Rep. 198); *Coit v. Gold Amalgamating Co.*, 119 U. S. 343 (7 Sup. Ct. Rep. 231); *Handley v. Stutz*, 139 U. S. 417, 435 (11 Sup. Ct. Rep. 530). It does not exist in favor of a subsequent creditor who has dealt with the corporation with full knowledge of the arrangement by which the "bonus" stock was issued, for a man cannot be defrauded by that which he knows when he acts. *First Nat. Bank v. Gustin, etc., Mining Co.*, *supra*. It has also been held not to exist where the stock has been issued and turned out at its full market value to pay corporate debts. *Clark v. Bever, supra*. The same has been held to be the case where an active corporation, whose original capital has been impaired, for the purpose of recuperating itself issues new stock, and sells it on the market for the best price obtainable, but for less than par (*Handley v. Stutz, supra*); although it is difficult to perceive, in the absence of a statute authorizing such a thing (of which every one dealing with corporations is bound to take notice), any difference between the original stock of a new corporation and additional stock issued by a "going concern." It is difficult, if not impossible, to explain or reconcile these cases upon the "trust-fund" doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and in case the corporation becomes insolvent, the law, upon the plainest princi-

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Basis

ples of common justice, says to the delinquent stockholder, "Make that representation good by paying for your stock." It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of "bonus" stock. This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the "trust-fund" doctrine has involved it; and we think that, even when the trust-fund doctrine has been invoked, the decision in almost every well-considered case is readily referable to such a rule.

Rule

It is urged, however, that, if fraud be the basis of the stockholders' liability in such cases, the creditor should affirmatively allege that he believed that the bonus stock had been paid for, and represented so much actual capital, and that he gave credit to the corporation on the faith of it; and it is also argued that, while there may be a presumption to that effect in the case of a subsequent creditor, this is a mere presumption of fact, and that in pleadings no presumptions of fact are indulged in. This position is very plausible, and at first sight would seem to have much force; but we think it is unsound. Certainly any such rule of pleading or proof would work very inequitably in practice. Inasmuch as the capital of a corporation is the basis of its credit, its financial standing and reputation in the community has its source in, and is founded upon, the amount of its professed and supposed capital, and every one who deals with it does so upon the faith of that standing and reputation, although, as a matter of fact, he may have no personal knowledge of the amount of its professed capital, and in a majority of cases knows nothing about the shares of stock held by any particular stockholder, or, if so, what was paid for them. Hence, in a suit by such creditor against the holders of "bonus" stock, he could not truthfully allege, and could not affirmatively prove, that he believed that the defendants' stock had been paid for, and that he gave the corporation credit on the faith of it, although, as a matter of fact, he actually gave the credit on the faith of the financial standing of the corporation, which was based upon its apparent and professed amount of capital. The misrepresentation as to the amount of capital would operate as a fraud on such a creditor as fully and effectually as if he had personal knowledge of the existence of the defendants' stock, and believed it to have been paid for when he gave the credit. For this reason, among others, we think that all that it is necessary to allege or prove in that regard is that the plaintiff is a subsequent creditor; and that, if the fact was that he dealt



with the corporation with knowledge of the arrangement by which the "bonus" stock was issued, this is a matter of defence. *Gogebio Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427 (47 N. W. Rep. 726). Counsel cites *Fogg v. Blair*, *supra*, to the proposition that the complaint should have stated that this stock had some value; but that case is not in point, for the plaintiff there was a prior creditor; and, as his debt could not have been contracted on the faith of stock not then issued, he could only maintain his action, if at all, by alleging that the corporation parted with something of value.

In one respect, however, we think the complaint is clearly insufficient. The thrasher company is here asking the interposition of the court to aid in enforcing an equity in favor of creditors against the stockholders by declaring them liable to pay for this stock contrary to their actual contract with the corporation. While the proceeding is not, strictly speaking, an equitable action, yet the relief asked is equitable in its nature. Under such circumstances, it was incumbent upon the thrasher company to show its own equities, and that it was in a position to demand such relief. It was not the original creditor of the car company, but the assignee of the original creditors. By that purchase it, of course, succeeded to whatever strictly legal rights its assignors had; but it is not rights of that kind which it is here seeking to enforce. Under such circumstances, we think it was incumbent upon it to state what it paid for the claims, or at least to show that it paid a substantial, and not a mere nominal, consideration. The only allegation is that it paid "a valuable consideration." This might have been only one dollar. It appears that it bought the claims after the car company had become insolvent, and its affairs were in the hands of a receiver; also that the indebtedness of that company amounted to about \$3,000,000, and that there were not corporate assets enough to pay any considerable part of it. The mere chance of collecting something out of the stockholders does not ordinarily much enhance the selling price of claims against an insolvent corporation. If any person or company had gone to work and bought up for a mere song this large indebtedness of the car company for the purpose of speculating on the liability of the stockholders, no court would grant them the relief here prayed for. It would say to them: "We will not create and enforce an equity for the benefit of any such speculation." Counsel for respondent suggest that the thrasher company is but an organization of the original creditors, who formed it, and pooled their claims, so as to save something out of the wreck of the car company; but nothing of the kind is alleged. On this ground the demurrer should have been sustained.<sup>1</sup>

<sup>1</sup> There would seem to be no reason why the principle of this case should not apply to an original issue of all the shares to promoters for overvalued property. See *Coleman v. Howe*, 184 Ill. 458.

29 Pac. 1090 & 150 Cal 764. 45/58, 117 Pac 1041 of '12 Am.B 491: 444  
22 M.R. The Cap of a Corp. Truckers Ham 929 et seq

(c) Right to compel Repayment of Moneys improperly disbursed as Dividends.

*of 1892 & 1893*

*f 562 w*

McDONALD, RECEIVER, v. WILLIAMS.

1899. 174 United States, 397.

Suit by receiver of the Capital National Bank of Lincoln, Nebraska, to recover from defendants, stockholders in the bank, the amount of certain dividends previously received by them.

Upon a trial in the U. S. Circuit Court there was a decree in favor of plaintiff for the recovery of a part of the sums claimed. Both parties appealed. Upon the argument of the appeal in the Circuit Court of Appeals, that court desired the instruction of the Supreme Court on certain questions.

It appears from the statement of facts made by the court that the bank suspended payment in January, 1893, in a condition of hopeless insolvency, the stockholders, including the defendants, have been assessed to the full amount of their respective holdings, but the money thus obtained, added to the amount realized from the assets, will not be sufficient even if all dividends paid during the bank's existence were repaid to the receiver, to pay seventy-five per cent. of the claims of the bank's creditors.

This suit was brought to compel the repayment of certain dividends paid by the bank to the defendants on that part of the capital of the bank represented by their stock of the par value of \$5000, on the ground alleged in the bill that each of said dividends was fraudulently declared and paid out of the capital of the bank, and not out of net profits.

A list of the dividends and the amount thereof paid by the bank from January, 1885, to July, 1892, both inclusive, is contained in the statement, and it is added that all dividends, except the last, (July 12, 1892,) were paid to the defendant Williams, a stockholder to the amount of \$5000, from the organization of the bank. The last dividend was paid to the defendant Dodd, who bought Williams' stock, and had the same transferred to his own name December 16, 1891.

When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend, down to and including July, 1891, was declared and paid, there were no net profits. The capital of the bank was impaired, and the dividends were paid out of the capital, but the bank was still solvent. When the dividends of January and July, 1892, were declared and paid there were no net profits, the capital of the bank was lost, and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank, and received the dividends in good faith, relying on the officers of the bank, and believing the dividends were coming out of the profits.

*Rec. sues to recover 2 shh's divs  
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but bank was still  
solvent. Divs  
1892 were paid  
after insolvent  
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payt 1893  
divs were of  
innocent shh's*

Upon these facts the court desired the instruction of this court for the proper decision of the following questions :

First question. Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of the capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of the profits, and when the bank, at the time such dividend was declared and paid, was not insolvent?

[The second question is omitted.]

*Edward Winslow Paige*, for appellant.

*Theodore De Witt* (*George G. De Witt* with him), for appellees.

PECKHAM, J. . . . The complainant bases his right to recover in this suit upon the theory that the capital of the corporation was a trust fund for the payment of creditors entitled to a portion thereof, and having been paid in the way of dividends to the shareholders that portion can be recovered back in an action of this kind for the purpose of paying the debts of the corporation. He also bases his right to recover upon the terms of section 5204 of the Revised Statutes.

*J. J. By does not apply while Corp is solvent*  
We think the theory of a trust fund has no application to a case of this kind. When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation.

In *Graham v. Railroad Company*, 102 U. S. 148, 161, it was said by Mr. Justice Bradley, in the course of his opinion, that "when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors, and a court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

And in *Hollins v. Brierfield Coal and Iron Company*, 150 U. S. 371, 383, 385, it was stated by Mr. Justice Brewer, in delivering the opinion of the court, and speaking of the theory of the capital of a corporation being a trust fund, as follows :

"In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the clutch of a creditor who has acquired no lien ; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for

the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And also :

"The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or, sometimes, even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

Other cases are cited in the opinion as holding the same doctrine.

In *Wabash, etc., Railway Company v. Ham*, 114 U. S. 587, 594, Mr. Justice Gray, in delivering the opinion of the court, said :

"The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

These cases, while not involving precisely the same question now before us, show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of the property.

The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.

It is contended on the part of the complainant, however, that if the assets of the bank are impressed with a trust in favor of its creditors when it is insolvent, they must be impressed with the same trust when it is solvent; that the mere fact that the value of the assets of the corporation has sunk below the amount of its debts, although as

yet unknown to any body, cannot possibly make a new contract between the corporation and its creditors. In case of insolvency, however, the recovery of the money paid in the ordinary way without condition is allowed, not on the ground of contract to repay, but because the money thus paid was in equity the money of the creditor; that it did not belong to the bank, and the bank in paying could bestow no title in the money it paid to one who did not receive it *bona fide* and for value. The assets of the bank, while it is solvent, may clearly not be impressed with a trust in favor of creditors, and yet that trust may be created by the very fact of the insolvency, and the trust enforced by a receiver as the representative of all the creditors. But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent. That question is not herein presented to us, and we express no opinion in regard to it. We only say, that if such a dividend be recoverable, it would be on the principle of a trust fund.

Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations. Where there is no statute providing what particular act shall be evidence of insolvency or bankruptcy, it may be and it sometimes is quite difficult to determine the fact of its existence at any particular period of time. Although no trust exists while the corporation is solvent, the fact which creates the trust is the insolvency, and when that fact is established at that instant the trust arises. To prove the instant of creation may be almost impossible, and yet its existence at some time may very easily be proved. What the precise nature and extent of the trust is, even in such case, may be somewhat difficult to accurately define, but it may be admitted in some form and to some extent to exist in a case of insolvency.

Hence it must be admitted that the law does create a distinction between solvency and insolvency, and that from the moment when the latter condition is established the legality of acts thereafter performed will be decided by very different principles than in a case of solvency. And so of acts committed in contemplation of insolvency. The fact of insolvency must be proved in order to show the act was one committed in contemplation thereof.

Without reference to the statute, therefore, we think the right to recover the dividend paid while the bank was solvent would not exist.

But it is urged on the part of the complainant that section 5204 of the Revised Statutes makes the payment of a dividend out of capital illegal and *ultra vires* of the corporation, and that money thus paid remains the property of the corporation, and can be followed into the hands of any volunteer.

The section provides that "no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." What is meant by this language? Has a shareholder withdrawn or permitted to be withdrawn in the form of a dividend any portion of the capital of the bank when he has simply and in good faith received a dividend declared by a board of directors of which he was not a member, and which dividend he honestly supposed was declared only out of profits? Does he in such case within the meaning of the statute withdraw or permit to be withdrawn a portion of the capital? The law prohibits the making of a dividend by a national bank from its capital or to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. The fact of the declaration of a dividend is in effect the assertion by the board of directors that the dividend is made out of profits. Believing that the dividend is thus made, the shareholder in good faith receives his portion of it. Can it be said that in thus doing he withdraws or permits to be withdrawn any portion of the capital of the corporation? We think he does not withdraw it by the mere reception of his proportionate part of the dividend. The withdrawal was initiated by the declaration of the dividend by the board of directors, and was consummated on their part when they permitted payment to be made in accordance with the declaration. We think this language implies some positive or affirmative act on the part of the shareholder by which he knowingly withdraws the capital or some portion thereof, or with knowledge permits some act which results in the withdrawal, and which might not have been so withdrawn without his action. The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above.

One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly yet in entire good faith receiving his proportionate part of the dividend? Is each shareholder an absolute insurer that dividends are paid out of profits? Must he employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a dividend has been declared as an assurance that it was declared out of profits and not out of capital, because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal, he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances we cannot think that Congress intended by the use of the expression "withdraw or permit to be withdrawn, either in the form of dividends, or otherwise," any

portion of its capital, to include the case of the passive receipt of a dividend by a shareholder in the *bona fide* belief that the dividend was paid out of profits, while the bank was in fact solvent. We think it would be an improper construction of the language of the statute to hold that it covers such a case.

We are strengthened in our views as to the proper construction of this act by reference to some of its other sections. The payment of the capital within a certain time is provided for by sections 5140 and 5141. Section 5151 provides for the individual responsibility of each shareholder to the extent of his stock at the par value thereof in addition to the amount invested therein. (These shareholders have already been assessed under this section.) And section 5205 provides for the case of a corporation whose capital shall have become impaired by losses *or otherwise*, and proceedings may be taken by the association against the shareholders for the payment of the deficiency in the capital within three months after receiving notice thereof from the Comptroller. These various provisions of the statute impose a very severe liability upon the part of holders of national bank stock, and while such provisions are evidently imposed for the purpose of securing reasonable safety to those who deal with the banks, we may nevertheless say, in view of this whole system of liability, that it is unnecessary, and that it would be an unnatural construction of the language of section 5204 to hold that in a case such as this a shareholder, by the receipt of a dividend from a solvent bank, had withdrawn or permitted to be withdrawn any portion of its capital.

We may concede that the directors who declared the dividend under such circumstances violated the law, and that their act was therefore illegal, but the reception of the dividend by the shareholder in good faith, as mentioned in the question, was not a wrongful or designedly improper act. Hence the liability of the shareholder should not be enlarged by reason of the conduct of the directors. They may have rendered themselves liable to prosecution, but the liability of the shareholder is different in such a case, and the receipt of a dividend under the circumstances is different from an act which may be said to be generally illegal, such as the purchase of stock in one national bank by another national bank for an investment merely, which is never proper. *Concord First National Bank v. Hawkins*, just decided, *ante*, 364.

The declaration and payment of a dividend is part of the course of business of these corporations. It is the thing for which they are established, and its payment is looked for as the appropriate result of the business which has been done. The presumption of legality attaches to its declaration and payment, because declaring it, is to assert that it is payable out of the profits. As the statute has provided a remedy under section 5205 for the impairment of the capital which includes the case of an impairment produced by the payment of a dividend, we think the payment and receipt of a dividend under

the circumstances detailed in the question certified do not permit of its recovery back by a receiver appointed upon the subsequent insolvency of the bank.

The facts in the various English cases cited by counsel for complainant are so entirely unlike those which exist in this case that no useful purpose would be subserved by a reference to them. Not one holds that a dividend declared under such facts as this case assumes can be recovered back in such an action as this.

We answer the first question in the negative.<sup>1</sup>

C.C. Code 309

<sup>1</sup> After the Supreme Court had given the above opinion, the Circuit Court of Appeals rendered judgment against the receiver as to the dividends in the years when the bank was still solvent, and against the defendant stockholders for the dividends paid during insolvency. LACOMBE, J., said: "No question was propounded" (i. e., to the Supreme Court) "as to the dividends paid when the bank was actually insolvent, as we had no doubt the receiver could recover them in a proper action." *Hayden v. Williams*, 96 Federal Reporter, 272, pp. 283, 284. See, also, *Grant v. Ross*, A. D. 1896, 100 Kentucky, 44. — ED.

shh Lib - Nature 39 Am LRep (1901) 586

shh Lib - solv. or insolv.

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Payg Div<sup>d</sup> ex cap. 44 Can Lg 94-106 Feb 08



BOOK IV.

SHARES OF STOCK.

CHAPTER I.

ISSUE AND PAYMENT. HEREIN OF WATERED STOCK.

WINDSOR ELECTRIC LIGHT CO. v. TANDY.

1893. 66 Vermont, 248.

TYLER, J. This is an action of general assumpsit brought by the plaintiff company to recover of the defendant an assessment upon his subscription for shares of the plaintiff's capital stock.

It appeared in evidence that the defendant and eight other persons, on Feb. 21, 1890, associated themselves together as a corporation, under ch. 153, R. L., as follows :

"We, the subscribers, hereby associate ourselves together as a corporation under the laws of the state of Vermont, to be known by the name of the Windsor Electric Light Co., for the purpose of furnishing electric light, electric heat and electric power at Windsor, in the county of Windsor, in the state of Vermont, with a capital stock of five thousand dollars, divided into two hundred shares of twenty-five dollars each. Dated at said Windsor, this 21st day of February, A. D. 1890."

The articles of association were duly recorded July 3, 1890, in the office of the secretary of state, whereupon the corporation was organized, by-laws were adopted and officers were elected as provided by the statute. At a meeting held Nov. 29, 1890, it was voted to assess the stock one hundred cents on each dollar subscribed, and the assessment was made payable Dec. 15, 1890.

The defendant's subscription was as follows :

"Frank H. Tandy, . . . . . 80 shares,"  
following which were the names and subscriptions of the other eight subscribers.

When the defendant and others, by articles, had associated themselves together pursuant to the provisions of the statute, and the arti-

cles had been recorded and certified by the secretary of state, and the corporation had been organized, and all the conditions precedent required by the statute had been complied with, those persons became a body politic and corporate under the laws of the state. The plaintiff's corporate existence was then and thereby established, and the defendant became, by the act of subscription, a stockholder. His subscription is presumed to have been accepted by the plaintiff, and it was binding upon it and upon the defendant, the prospective rights of membership being a sufficient consideration to support the contract. *Beach on Pri. Cor.*, ss. 63 and 513; *Hartford & New Haven R. Co. v. Kennedy*, 12 Conn. 499.

Whether the defendant, by becoming a stockholder, incurred a personal liability to pay his proportion of such assessments as should be laid upon the stock, can best be determined by inquiring what the relation was which he assumed towards the corporation by the act of subscription. By agreement the entire capital was to be five thousand dollars, divided into two hundred shares of twenty-five dollars each. The defendant subscribed for and agreed to take eighty shares, and the corporation, by accepting his subscription, became obligated to assign that number of shares to him. It seems clear, then, that the defendant impliedly promised to contribute towards the entire capital as much money as his number of shares represented, and in such instalments and at such times as the corporation should require.<sup>1</sup> *D 78. 475-77. 83.*

*Cf. L. M. when issued 223 CCC*

*See of H. C. R. recess? after insolvency. 1 Cal. R. 59. n.*

*OAKES v. TURQUAND.*

1867. *Law Reports, 2 House of Lords*, 325.

OVEREND, GURNEY & Co., LIMITED, a company formed under the Companies Act of 1862, became financially involved and was wound up. Oakes moved that his name be stricken from the list of contributors, on the ground that he had been induced to become a member of the company by the fraudulent representations of its directors. The motion was denied.

LORD CRANWORTH:—

My Lords, the appellant, Mr. Oakes, in order to sustain his appeal, must make out two propositions. He must satisfy the House, first, that he was induced to take his shares in Overend, Gurney & Co., Limited, by the fraud of the company, or of those for whom the company became responsible; and, secondly, if that is

<sup>1</sup> In *Pacific National Bank v. Eaton*, 141 U. S. 227, 234, the court said that a shareholder "may take out a certificate or not, as he sees fit. Millions of dollars of capital stock are held without any certificate; or, if certificates are made out, without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself. And an actual subscription is not necessary. There may be a virtual subscription, deducible from the acts and conduct of the party."

made out, that he ought not to be retained on the list of contributories. The first question is one of fact, and its determination, however important to the parties concerned, is of no general interest. The other question is of very extensive consequence in the mercantile world. It is of the utmost importance that persons dealing with joint stock companies should be in no doubt as to who are the persons to whom they are entitled to look as liable to perform the obligations and pay the debts of the partnership.

I shall proceed at once to consider this second question — to determine what are the relative rights of Mr. Oakes and the creditors, and for this purpose shall assume it to be true that he was induced to take shares by the fraud of the company, or of those for whom the company became responsible. There is no doubt that the direct remedy of a creditor is solely against the incorporated company. He has no dealing with any individual shareholder, and if he is driven to bring an action to enforce any right he may have acquired, he must sue the company, and not any of the members of whom it is composed. This being so, the argument of the appellant is, that it is only to the assets of the company that the creditor can resort, and so that the only question is, of what those assets consist. This question, he contends, so far as the assets consist of money to be recovered by legal process against other persons, whether shareholders or not, can only be solved by ascertaining what rights the company has against those other persons. If in any proceeding by the company instituted for the purpose of recovering money from any person, that person has a valid defence, whether legal or equitable, the appellant contends that the sum claimed from him does not form part of the assets of the company. These assets, he says, consist solely of property in the actual possession of the company, or which the company can recover by means of legal proceedings. In this case the appellant contends that he was induced to become a shareholder by means of a fraud which entitles him to repudiate the status of shareholder, and to say, as between himself and the company, that he never held a share. And if he can say this against the company, then the appellant contends he can say it against all the world, for his liability is a liability to the company and to no one else.

. . . Sect. 74 [of the Companies Act] defines contributories to be all persons liable to contribute to the assets in the event of the company being wound up; and sect. 38 declares that on that event every present and past member shall be liable to contribute subject to certain qualifications. In order to ascertain who are designated by the word "members" in sect. 38, we must refer to sect. 23, which states that every person who has agreed to become a member, and whose name is entered on the register, shall be deemed to be a member of the company.

The name of Mr. Oakes was certainly entered on the register; if, therefore, he agreed to become a member within the meaning of this

23d section, he is a contributory. The argument is, that he did not so agree, because all which he did, he did under the influence of fraud and misrepresentation. But assuming all that to be, and I believe it was, just as Mr. Oakes represents it, still he did agree to become a member — that is, he in fact agreed. He may have full rights against those who deceived him, but with that the outer world can have no concern. § 80.

*Appeal dismissed.*

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16) PENOBSCOT RAILROAD COMPANY v. WHITE.

*Can assess on no cash debt*

1856. 41 Maine, 512.

ACTION to collect an assessment levied by the plaintiff upon the shares of its stock held by defendant.

MAY, J. It is undoubtedly true, as is contended by the able counsel in defence, that the right to assess money upon corporators depends upon the right to use it when assessed and paid; but the right to use it may, without doubt, exist, notwithstanding there is no actual indebtedness on the part of the corporation existing at the time when the assessment is made. It may be, and often is, expedient to make assessments, in view of anticipated liabilities, to be subsequently incurred in the prosecution of the general purposes for which the corporation was created; but it may be questioned, whether it would not generally be much wiser, and would not better promote the pecuniary interests of such corporations, to postpone the making of their contracts until a solvent treasury should insure the prompt performance of them on their part. Contractors, then, would have no occasion to exact exorbitant prices, because of the uncertainty of their being promptly paid, if paid at all. But whether expedient or not to assess moneys, in anticipation of liabilities to be subsequently created, there can, in our judgment, be no doubt of the existence of the power in the plaintiff corporation to make such assessments, and if rightly made, we know of no authority, and none has been cited, tending to show that such assessments, even though the money should be subsequently misappropriated by the corporation or its agents, would be void; nor can we perceive any reason why such assessments, if made to raise money for the general but legitimate purposes of the corporation, when the corporation, through its directors, had made contracts for the execution of those purposes, should be void, even though it might subsequently turn out that such contracts were invalid, for want of authority in the directors to make them. In such a case the enterprise itself is lawful, being the very one for which the corporation was created; but the mode adopted for its completion is unlawful, being unauthorized by the charter. The moneys are assessed for the

legitimate objects of the charter, but the contracts to secure the accomplishment of those objects are invalid. Such contracts may be avoided, and the moneys raised, may, notwithstanding, be appropriated in conformity with the charter for the very purposes for which the corporation was created. It is, therefore, apparent that the right to make assessments cannot be made to depend upon any actual indebtedness existing at the time, nor defeated by any apparent indebtedness incurred under a contract which was void. It ought, perhaps, rather to be presumed that the corporation will effect the purposes of its charter in some legal way, and that the moneys assessed will be invested for that purpose.

ccc 331, 332 - 346

504 Cook § 121-124 <sup>10</sup> IN RE THE EXCHANGE BANKING COMPANY.

1881. *Law Journal Chancery, New Series*, Vol. 50, p. 827.

A COMPANY issued shares, which were thereafter forfeited to the company by non-payment of calls. The company then sold the shares to Ramwell for less than their par value. On the winding-up of the company, the question was whether Ramwell was bound to pay the difference between the par value of these shares and the amount actually paid for them.

BACON, V. C. The first point which I will deal with is the question of the 70<sup>l</sup>., which the official liquidator says ought not to be allowed to Mr. Ramwell, because section 25 of the Companies Act, 1867, requires that any agreement acquiring shares at less than the nominal value should be in writing and registered, and there is no such contract here. As far as the evidence goes, the company had issued shares to certain persons, who had failed to fulfil their duties by paying calls, and the company had consequently exercised their power of cancelling and forfeiting these shares, and these shares became the property of the company again. But they are no longer shares to which the registration clause applies; they are not shares "issued" by the company. The directors had these shares to sell, and they chose to sell them for 70<sup>l</sup>. less than their full price. These shares were chattels in their possession,—things they could sell, things they had acquired by reason of the forfeiture. There is no ground for saying that such a transaction ought to be registered, or that it was void for want of registration. 337 - 349.

cf 154/53.72

343 344

When a corp offers stock for sale to pay a delinq. ass<sup>t</sup> it acts as a delinq. ch<sup>r</sup>. It only acquires title in default of bidders & by bid<sup>g</sup> it in re when stock is offered for sale & is purch<sup>d</sup> thereat, purch<sup>r</sup> takes title & delinq. purch<sup>r</sup> has no other r<sup>e</sup> when she takes it sub<sup>j</sup> to c<sup>h</sup> & for unp<sup>d</sup> subscrip<sup>r</sup> price.

## PEOPLE v. BOARD OF RAILROAD COMMISSIONERS.

1908. 81 *New York, Appellate Division*, 242.

THE New York and Port Chester Railroad Company petitioned for a certificate that public convenience and necessity required the construction of the railroad proposed in its articles of association. The New York, New Haven & Hartford Railroad Company (the relator herein) opposed the application. One of its grounds was that the company had not been organized as required by law.

PARKER, P. J. It is further urged that because \$25,000, being ten per cent of the minimum amount of the capital stock of the company, had not been paid in *cash* at the time the certificate of incorporation was filed, such filing was void under the provisions of section 2 of the General Railroad Law (as amd. by Laws of 1892, chap. 676), and hence that the applicant has no lawful organization. Such certificate was filed on April 3, 1901, and it is clear from the evidence taken before the commissioners that at that time none of the stock subscribed for had been paid for in *cash*. The names of every subscriber for stock, and the amount taken by each, are set forth in the certificate filed, from which it appears that the requisite ten per cent had been subscribed for, and there is an affidavit annexed to the certificate, made by three of the directors, that it had all been paid for in *cash*. But, as a matter of fact, not one of such subscribers had paid anything. One Gotshall, who was neither a director nor a subscriber for stock, had, on the second day of April, drawn his check on the Garfield National Bank against his own individual account for the sum of \$25,000, payable to his own order, and by him endorsed as follows: "For deposit to the credit of the account of the New York and Port Chester Railroad Company, or C. O. Mailloux." Such check he delivered to Mailloux, who was a director of the company, and undoubtedly he had sufficient funds in bank to meet it, and also intended it as the payment to the company required by such section 2. Mailloux held such check until April eleventh, when it was presented to the Garfield National Bank, and, upon being cashed, the amount was passed to the credit of the railroad company in such bank. Such check was not certified, and very clearly no arrangement had been made with the bank, or in any manner, by force of which the fund against which it was drawn was appropriated solely to its payment. At any time before its presentment, the fund in bank was subject to Gotshall's order, and absolute and final control of it had not been given to the company. Hence, within the decisions, I am of the opinion that such check cannot be deemed a payment in cash. (*Matter of Kings, Queens & Suffolk Railroad Co.*, 6 App. Div. 241; *Durant v. Abendroth*, 69 N. Y. 148.)

The distinction as to when a check may, and when it may not, be deemed *cash* is made apparent by the following language used in *White v. Eiseman*, 134 N. Y. 101, 107, to wit: "We think that where the money is actually in the bank to the credit of the special partner, and he gives absolute and final control of it to the general partner, it should be regarded as a payment in cash. The delivery of a *certified* check to the payee has this effect."

290e. 291(+). 295.

# LAKE SUPERIOR IRON COMPANY v. DREXEL.

1882. 90 New York, 87.

*Compenses etc 15000*  
*stock for certain*  
*patents & certn*  
*mfg plants*  
*but subscriber*  
*agreed to turn*  
*over 5000*  
*25000 to a*  
*trustee sold at \$50 +*  
*10 per share to*  
*the subscriber.*  
*Also 5000*  
*25000 in Cash*  
*total*

EARL, J. This is an action against the defendant as a stockholder of the Blair Iron and Steel Company to recover the amount of a debt due from that company to the plaintiff, on the ground that the company was not so organized as to protect its stockholders from individual liability. The company was organized January 6, 1873, under the General Manufacturing Act (Chap. 40 of the Laws of 1848), with a nominal capital of \$2,500,000, divided into twenty-five thousand shares of \$100 each. The certificate of incorporation was signed by Blair, Struthers, Hall, Smith, and Miller, who were also designated as trustees to manage the affairs of the company for the first year. The objects of the corporation, as stated in the certificate, were "the manufacturing of iron and steel and of such articles as may be used in such manufacture; also the mining and transporting of such minerals as may be used in such manufacture." The five trustees met in New York City on the twentieth day of January, and elected Blair president and Smith secretary and treasurer of the company. At that meeting Struthers, one of the trustees, in behalf of the firm of Blair, Foster & Struthers, of which firm he was a member, submitted a written proposition to the company to sell to it certain patents for the manufacture of iron and steel and certain works at Pittsburgh, Pennsylvania, for the price of \$2,500,000, and to receive in payment therefor the whole capital stock of the company. The proposition also contained this provision: "Of the twenty-five thousand shares of stock, however, so delivered to us in payment for said patents and property, we agree to place six thousand shares in the hands of Gen. A. S. Diven, as mutual trustee for us, the Blair Iron and Steel Company, and the persons who may become purchasers of said six thousand shares; it being understood that said shares may be sold for \$50 per share, one third thereof to be paid down when the whole of said six thousand shares shall be subscribed for and taken, half of which first payment shall be paid over by said trustee to us when received by him, and the other half to the treasurer for the use of the company, and the whole amount of the remaining two thirds thereof shall be

paid over by him, when received, to the treasurer, for the use of said company. And we agree further to transfer to said A. S. Diven, as trustee, three thousand of the said twenty-five thousand shares, for the future use and benefit of said company, and the whole of the proceeds thereof when sold to be paid and accounted for by him to said company; the trustees to direct the sale of said three thousand shares at such time and on such terms as they may think best for the interest of the company." This proposition was, by a resolution of the trustees, accepted, and a direction was made that the stock be issued to Blair, Foster & Struthers, the certificates thereof to be signed by the president and secretary. On the same day a subscription paper was prepared, to be signed by persons who wished to subscribe for the six thousand shares at fifty per cent of their par value. That paper recited that the whole capital stock of the company had been paid up by the transfer of the patents and the works, and all issued to Blair, Foster & Struthers, who agreed to place in the hands of Diven, as trustee, nine thousand shares, to be used as working capital for the company, excepting \$50,000 of the proceeds thereof, which was first to be paid to them, and that the trustees of the company had ordered the sale of six thousand shares at \$50 per share. The defendant subscribed this paper for five hundred shares at \$50 per share, and all the six thousand shares were subscribed for by the twelfth day of April, 1873, when a formal transfer of the patent and works was made to the company. On that day a certificate of stock for twenty-five thousand shares numbered "Zero" was issued to Blair, Foster & Struthers, and on the same day it was returned and cancelled and a certificate numbered "1" for six thousand shares and another numbered "2" for three thousand shares were issued to Diven as trustee, and a certificate for the remaining sixteen thousand shares was issued to Blair, Foster and Struthers.

The proceeds of the six thousand shares subscribed for at \$50 per share were paid to the treasurer of the company, and out of the same \$50,000 were paid to Blair, Foster & Struthers, according to the terms of their proposition as above set out.

Section 10 of the act of 1848 provides that all the stockholders of every company incorporated under that act "shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in"; and section 14 provides that "nothing but money shall be considered as payment of any part of the capital stock." In 1853, by the act chapter 333 of that year, the act of 1848 was amended, by providing that the trustees of any company formed under that act "may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock and not liable to any further calls; neither shall



the holders thereof be liable for any further payments under the provisions of the tenth section of the said act." The claim of the plaintiff is that the whole amount of the capital stock was not paid in, and hence that the defendant is liable to it under section 10 above set out; and it contends that it conclusively appears that Blair, Foster & Struthers actually received only sixteen thousand shares of the stock and \$50,000 in cash for the property which they transferred to the company.

All the trustees who took from Blair, Foster & Struthers the transfer of the property and caused the stock to be issued to them, were called as witnesses upon the trial, and each testified that he acted in good faith in the transactions and believed the property received was worth the sum of \$2,500,000, and the defendant also gave evidence tending to show that the trustees had good grounds for believing that the property was worth the sum named, and that the stock was issued therefor in good faith.

At the close of the evidence on both sides, plaintiff's counsel moved the court to direct a verdict for the plaintiff upon the ground that "the capital stock of the defendant's corporation being fixed at twenty-five thousand shares, and sixteen thousand shares having been issued in payment for property, and six thousand shares being issued to cash subscribers at fifty per cent of their par, the capital has never been fully paid as required by law." Defendant's counsel moved the court to direct a verdict for the defendant, and to hold that there was nothing in the case which would justify the jury, if the question were submitted to them, in finding that the sale of the property was made in bad faith, or with the intention to evade the requirements of the statute. The court denied both motions and held that the case should be submitted to the jury for them to determine whether the receiving the property and issuing the stock therefor was an honest transaction, consummated in good faith, or whether it was a scheme to evade the statute. In charging the jury the court said: "The real question, therefore, is whether the property was placed and taken at a higher valuation with a fraudulent purpose, with the intent of evading the provisions of the statute."

We are of opinion that the court committed no error in the submission of the case to the jury. In *Douglass v. Ireland*, 73 N. Y. 100, it was laid down as the law in this state that to charge a holder of stock, issued upon and for the purchase of property, individually for the debts of the company, it is not enough to prove that the property was purchased and paid for at an overvaluation through a mistake or error of judgment on the part of the trustees, but that it must be shown that the purchase at the price agreed upon was in bad faith and to evade the statute; and that all that is necessary to establish the legal fraud and take the stock issued out of the immunity assured to stock honestly issued in pursuance of the act of 1853 is to prove two facts: (1) That the stock issued exceeded in amount the value of the property in exchange

for which it was issued; and (2) that the trustees deliberately and with knowledge of the real value of the property overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value. In that case the whole capital stock of the company, three thousand shares, was issued for property to one Horton, and he, in pursuance of an agreement with the company, on or about the same date, transferred back to the company six hundred shares, to be sold to pay the contract price which Horton had agreed to pay for some of the very property transferred to the company for its stock, and also one thousand shares for the purpose of enabling the company to raise a working capital by the sale of the same. The question of the value of the property received for the stock was submitted to a jury, and they found it to be \$65,000, and the other questions in the case were decided by the court and it found that the value of the property was so disproportionate to the nominal value of the stock as to take the case out of a sound discretion exercised by the trustees; that the transaction was a fraud upon the law and could not be upheld as a mistake or innocent misunderstanding of the value of the property; that the capital had not been paid in as required by the statute, and that the defendant was therefore liable. The decision of the trial term in that case was upheld, not upon the theory that as matter of law upon the facts proved the capital stock had not been paid in, but upon the findings of fact that it had not been paid in; and whether it was paid in or not was treated as a question of fact which was found against the defendant. Afterward another action was commenced against the same defendant by another plaintiff, and upon substantially the same evidence the jury rendered a verdict in favor of the defendant, and the judgment entered thereon was affirmed at the General Term, upon the ground that the trial judge had substantially followed the case of *Douglass v. Ireland* in submitting the case to the jury. (*Brockway v. Ireland*, 61 How. Pr. 372.)

In this case the evidence was very persuasive, that the trustees, in exchanging the stock of the company for the property taken, were endeavoring to evade and circumvent the law, but it was not conclusive. Another view of the evidence was possible, and that is, that the parties believed the property to be worth \$2,500,000, for the uses and purposes of the corporation, and that the trustees actually gave the entire stock for it. The title to the stock passed out of the company, and Blair, Foster & Struthers could then do with the stock what they pleased, sell it, give it away, or transfer a portion of it to the company, in order that the business of the company might be successfully prosecuted, and thus the sixteen thousand shares of stock still held by them rendered more valuable.

When they transferred the nine thousand shares they made a transfer of actual stock which had been paid for, which belonged to them, and which, but for their agreement with the company, they could hold against it. The fact that they were under obligation to devote a portion

of the stock received by them to the purposes of creating, through a trustee, a working capital for the company, by which they were to be benefited more than all others, no more altered the real nature of the transaction than if they had agreed to contribute a large sum of money toward the working capital instead of stock. It could not be said, as matter of law, that the property transferred for the stock was not worth the nominal value of the stock, or that the trustees did not believe, and have reasons to believe, that it was, and it could not be said that they did not issue the whole amount of the stock in payment for the property, because they did, in form, so issue it. Whether the form the transaction took was a mere sham, intended as an evasion of the statute, was a question of fact for the determination of the jury.

It may be said that the statute may thus easily be circumvented and evaded; but the policy of the law will be preserved and enforced if all the questions of fact in such cases be left to the jury under principles laid down in the cases cited.

If right in the views thus far expressed, no error was committed by the trial judge in his charge to the jury and in his refusals to charge as requested by plaintiff's counsel.

The exceptions taken during the progress of the trial to rulings upon questions of evidence have been carefully examined and considered, and it is not believed that any of them point out any error which calls for a reversal of the judgment.

The judgment should be affirmed, with costs.

All concur, except TRACY, J., who does not vote.

of Mich. L. R. 450 Const. 100 ECC 359 Clf 549 Judgment affirmed.

888, Pa. 1, sub. c.

99. James H. Huffer  
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SEE, RECEIVER, v. HEPPENHEIMER. Clf 540/106/85

1905. 69 New Jersey Equity, 36. 61 Clf 343 33 P. 258

THE Columbia Straw Paper Company, a New Jersey corporation, upon its organization in 1892, purchased from one Emanuel Stein, of Chicago, thirty-nine different mills or plants, for the manufacture of straw paper at a valuation of \$5,000,000. Stein had at or about the same time secured these mills at an aggregate price of not over \$2,250,000. The corporation became insolvent, and the creditors, through the receiver, sought to fasten a liability upon the original stockholders (who had taken the stock with notice of the facts stated above), on the ground that they occupied the position of subscribers to the capital stock who had not paid their subscriptions.

PITNEY, V. C., granted the relief sought. He said, in part: —

No doubt each of these investors really, and therefore in good faith, hoped and expected that the enterprise would prove what they called a success; that is, that the bonds were entirely safe, and so, probably,

"They estimated the v. r prop upon a capitaliz. r r expected to be made out of its use  
control r price. its product. - The qn is whether under our stat -- it is compellent  
to be realized as a favorably market. r product. r co. of a suppression, complete or. can  
be considered in the same way."

The trans<sup>n</sup> does n many ways: intrinsic v. prop or add to the product  
 not. Purely prospect<sup>n</sup> & sh<sup>d</sup> n be capitalized & stock at p<sup>r</sup> -  
 of attempt to recover future<sup>n</sup> as a. Part<sup>n</sup> is a real time seat<sup>n</sup> of  
 injury may be shown. 49 Ill 217. Otherwise it is madness: as uncertainty of future  
 SEE v. HEPPENHEIMER. 611 58 24391  
 44 Ja 157  
 78 Ala 248:  
 7-9

was the preferred stock, and in like manner it was hoped and expected that the common stock would receive periodical dividends for a period of time long enough at least to enable some, if not all, of it to be marketed, or, to use the apt phrase which has been applied to such transactions, "to be distributed to," and later to be "digested by the public."

I am unable to find that the defendants' belief and faith went beyond this.

But I am unwilling to adopt the notion that this sort of good faith is that which is required in order to legalize transactions like this under consideration.

And here we find the real motive and reason which give rise to these inflated values and "watering" of capital stock. It is the desire and intention to sell shares in a property owned by the corporation — for that is what capital stock represents — for more than they are really worth. And therein lies the intrinsically fraudulent character of these transactions.

I feel justified in so characterizing them, since the overvaluation of the property does not at all or in any manner increase its intrinsic or practical value, or in the least degree promote the real prosperity of the enterprise. A single paper mill will turn out just as much product capitalized at \$100,000 as \$200,000, and its rental value will be practically the same. The earnings and profit due to good management and skillful handling of the product will be the same, and these last do not depend at all upon the product-producing capacity of the mill. Finally, the division of the profits, if any there be, among the stockholders will be on the same basis, and the amount received by each stockholder will be the same, the only difference being in the percentage of the division, and the market values of the shares will finally settle down to the gauge of the dividends earned and declared.

But this straightforward mode of doing business does not satisfy the present-day promoter, whose object in making an overvaluation is twofold.

*First.* To sell shares at more than their real value, and thereby secure a *profit* immediately in hand. ("Profit" is the word used by Mr. Samuel Untermeyer in his evidence.)

*Second.* To obtain mercantile credit based on a large capital.

A large number of authorities, in apparent support of inflated values for purposes of capitalization, from different states in the union, were cited by counsel for defendants.

I shall not stop at this moment to discuss their value in this state and in this connection, because I find the law laid down in this state, under this statute, by the court of errors and appeals in the very recent case, cited by the defendants, of *Donald v. American Smelting Co.*, 62 N. J. Eq. (17 Dick.) 729. That case arose under the act of 1896, in which the language of the governing section (section 49) is more liberal than the corresponding section of the act governing the

present case, in that it has added the words, "and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive."

That, indeed, was a suit by a stockholder in a corporation, already organized and engaged in its legitimate business, to restrain an issue of stock in payment of additional property to be purchased, but the rule laid down by the learned judge, who spoke for a majority of the court, applies with equal, and I think greater, force to the present case, where creditors are asking for payment of their just debts.

After quoting (p. 731) section 48, and a portion of section 49 of the act of 1896, he proceeds: "The meaning of section 48 is not questionable. The money must equal the face value of the stock. The language of section 49 is even more explicit. The corporation may issue stock to the amount of the *value of the property*. The value of the property in the one case just as the value of the money in the other must at least equal the face value of the stock. Such was the view expressed for this court by Mr. Justice Depue in *Wetherbee v. Baker*, 35 N. J. Eq. (8 Stew.) 501, and supported by abundance of authority.

"The distinction between the contemplated issue of corporate stock for property and its issue for money lies not in the rule for valuation, but in the fact that different estimates may be formed of the value of property. When such differences are brought before judicial tribunals, the judgment of those who are by law entrusted with the power of issuing stock 'to the amount of the value of the property,' and on whom, therefore, is placed the first duty of valuing the property, must be accorded considerable weight, but it cannot be deemed conclusive when duly subjected to judicial scrutiny. Nor is it necessary that conscious overvaluation or any other form of fraudulent conduct on the part of these primary valuers should be shown to justify judicial interposition. Their honest judgment, if reached *without due examination into the elements of value, or if based in part upon an estimate of matters which really are not property, or if plainly warped by self-interest, may lead to a violation of the statutory rule as surely as would corrupt motive.*

"The cases in this state to which we are referred (citing cases) in support of the proposition that the honest judgment of the managers of a corporation, with respect to matters *intra vires*, cannot be disturbed at the instance of stockholders, all relate to transactions for which the legislature has set up no other criterion than the discretion of those managers. But the original issue of corporate stock is a special function, in the exercise of which the legislature has fixed the standard to be observed, and it is the duty of the courts, so far as their jurisdiction extends, to see that this standard is not violated, either intentionally or unintentionally."

This language, as I understand it, contains the very *ratio decidendi* of the case then under consideration, and is, therefore, binding on me, even if I did not concur in it, which I do most heartily.

The intention of the legislature expressed in these sections in question, in my judgment, manifestly was, that the capital stock of all corporations should *at the start* represent the same value whether paid for in property or money. That result can only be obtained by supposing that the property is to be appraised at its actual cash value, precisely as if a board of directors with the whole capital stock actually paid in cash is dealing at actual "arms'-length" as real purchasers with the owner of property proposed to be purchased as a real vendor without any interest in the directors to overvalue the property or other interests inconsistent with the real interest of the stockholders as such.

I say "at the start," because we all know that property purchased in good faith for cash is liable afterwards to depreciate in value owing to circumstances not foreseen at the time of its purchase.

After all, it seems to me that the true test, under this statute, as applied to the case here in hand, is this: if the company actually had to its credit in the bank the sum of \$5,000,000 would it have been willing to have paid that price in cash for the property in question for the uses and purposes to which it proposed to devote it; would the property be worth that sum in cash to the company?

Any less severe test will, it seems to me, fail to satisfy the letter and spirit of the two sections of the act before recited, which seem to me clearly to require that the shares of capital stock of any company organized under the act in force when this company was organized should be of equal value whether paid for in cash or property purchased.<sup>1</sup>

<sup>1</sup> See an article in 22 *Harvard Law Review*, 319, by George W. Wickersham, Attorney-General of the United States, in the course of which the author says:—

"In the case of corporations operating public utilities, the public has undoubtedly a legitimate interest in the amount of capital stock which may be issued, and the value placed by the organizers upon property acquired as a basis for stock issue, because the reasonableness of rates charged the public for the use of the utilities operated may depend to some extent upon the actual amount of legitimate capital invested in the enterprise, and on which the corporation has concededly the right to earn a fair return.

"But, *a priori*, there would seem to be no reason why the incorporators of an ordinary trading or business corporation should not ascribe any value they please to property with which they propose to engage in business, for the purpose of fixing the amount of the capital stock, nor why they should not give an interest in that capital by the issue of certificates representing shares therein to those who may have promoted or brought about the organization, so long as they do not deceive the public or those who may have to deal with the company, either by misrepresentation or suppression of the facts."

4 Mich RR 220, 526 Mich

Stock Trading 26 Pa. St. R. (n.d. Repley) 98-121. Mar 11

First Incentive 125-136 Cook §46

Transfer of Interest in *Ass't* (1904) 48 GR Reg 787, (1905) 44 GR Reg 240  
Unregistered 3d Col 1. 433 35. 09.  
Application, shares 30 Case R 9 65-68  
Mandamus to compel 19 Yale 462-4 - Refusal to upgrade 58 NYP 500-4  
614 TISDALE v. HARRIS.

## CHAPTER II.

### TRANSFER.

#### TISDALE v. HARRIS.

1838. 20 *Pickering* (Mass.), 9.

ASSUMPSIT on an oral agreement of the defendant, to sell to the plaintiff two hundred shares, with all the earnings thereon, in a Connecticut corporation.

Verdict for plaintiff. Motion to set aside verdict. One ground of the motion was, because the contract set up was within the statute of frauds.

*Bartlett* and *F. C. Loring*, for the motion.

*C. P. Curtis*, and *B. R. Curtis*, *contra*.

SHAW, C. J. [After deciding another question.] But by far the most important question in the case, arises on the objection, that the case is within the statute of frauds. This statute, which is copied precisely from the English statute, is as follows: "No contract for the sale of goods, wares or merchandise for the price of ten pounds (\$33.33) or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agent, thereunto lawfully authorized."

This being a contract for the sale of shares in an incorporated company in a neighboring State, for the price of more than ten pounds, and no part having been delivered, and no purchase money or earnest paid, the question is, whether it can be allowed to be good, without a note or memorandum in writing, signed by the party to be charged with it. This depends upon the question, whether such shares are goods, wares or merchandise within the true meaning of the statute.

It is somewhat remarkable that this question, arising on the *St. 29 Car. 2*, in the same terms, which ours has copied, has not been definitively settled in England. In the case of *Pickering v. Appleby*, Com. Rep. 354, the case was directly and fully argued, before the twelve judges, who were equally divided upon it. But in several other cases afterwards determined in Chancery, the better opinion seemed to be, that shares in incorporated companies, were within the statute, as goods or merchandise. *Mussell v. Cooke*, Prec. in Ch. 533; *Crull v. Dodson*, Sel. Cas. in Ch. 41.

We are inclined to the opinion, that the weight of authorities, in modern times, is, that contracts for the sale of stocks and shares in incorporated companies, for more than ten pounds, are not valid, unless there has been a note or memorandum in writing, or earnest or part payment. 4 Wheaton, 89, note; 3 Starkie on Evid. 4th Amer. Edit. 608.

Supposing this a new question now for the first time calling for a construction of the statute, the Court are of opinion that as well by its terms, as its general policy, stocks are fairly within its operation. The words "goods" and "merchandise," are both of very large signification. *Bona*, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word "merchandise" also, including in general objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies.

There are many cases indeed in which it has been held in England, that buying and selling stocks did not subject a person to the operation of the bankrupt laws, and thence it has been argued that they cannot be considered as merchandise, because bankruptcy extends to persons using the trade of merchandise. But it must be recollected that the bankrupt acts were deemed to be highly penal, and coercive, and tended to deprive a man in trade of all his property. But most joint stock companies were founded on the hypothesis at least, that most of the shareholders took shares as an investment and not as an object of traffic; and the construction in question only decided, that by taking and holding such shares merely as an investment, a man should not be deemed a merchant so as to subject himself to the highly coercive process of the bankrupt laws. These cases, therefore, do not bear much on the general question.

The main argument relied upon, by those who contend that shares are not within the statute, is this. That statute provides that such contract shall not be good &c., among other things, except the purchaser shall accept part of the goods. From this it is argued, that by necessary implication, the statute applies only to goods, of which part may be delivered. This seems however to be rather a narrow and forced construction. The provision is general, that no contract for the sale of goods &c. shall be allowed to be good. The exception is, when part are delivered; but if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others, to which from their nature it cannot apply.

There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these com-



1978. The agreement is invalid unless it came in some note or memo. Thereof he is only substituted for plaintiff or his agent (4) An agent or sales. It challenges this in an at a price or less than 200 -- no.

panies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the term goods, as they are within the reason and policy of the act, the Court are of opinion, that a contract for the sale of shares, in the absence of the other requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing, in the present case, the plaintiff is not entitled to maintain this action. As to the argument, that here was a part performance, by a payment of the money on one side, and the delivery of the certificate on the other, these acts took place after this action was brought, and cannot therefore be relied upon to show a cause of action when the action was commenced.

*Verdict set aside and plaintiff nonsuit.*

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 not with C to supply it in concerning 4, 1000 or more 21 J.E. 428. 429  
 In will call 47/142. Note 1929. S. 871

17 SARGENT v. FRANKLIN INSURANCE COMPANY.

1829. 8 Pickering (Massachusetts), 90.

THIS was assumpsit to recover damages of the defendants for refusing to transfer to the plaintiffs (copartners), on the books of the company, and deliver to them a certificate of twenty-five shares of the capital stock of the company, standing in the names of Adams & Amory, and alleged to have been assigned by them to the plaintiffs. Adams & Amory had held a certificate of these shares, dated February 10, 1824, and made an instrument of assignment of the same to the plaintiffs, dated May 24, 1826. On the next day, May 25th, before 12 o'clock, and during business hours, Brooks, one of the plaintiffs, called at the office of the company, and, the president of the company being absent, exhibited to the secretary the instrument of assignment with the power of attorney from the assignors to the assignees, empowering them to make a transfer of the shares on the company's books, and demanded certificates to be issued in the names of the assignees, offering, at the same time, to surrender the certificates of Adams & Amory. The secretary read the assignment and power, but declined doing anything in the matter, saying it was the president's business.

On the same day, May 25th, at 12 o'clock, the defendants caused the same shares to be attached, at their own suit against Adams & Amory. On the 9th of June and the 19th of October following, the defendants caused the same shares to be attached a second and a third time in other suits commenced by them against Adams & Amory

on two other demands which had respectively become due at those times. Judgment was recovered in all these suits and executions issued, on which all these shares were successively sold, and the proceeds paid over to the company in satisfaction of the demands against Adams & Amory.

The by-laws of the company make it the duty of the president "to attend at the company's office, during the hours of business," to discharge the various duties of his office. Certificates of stock are required by the by-laws, to be *authenticated* by the president, and it is made one of the duties of the secretary, "to attest all certificates and transfer of stock." The certificates bore upon the face of them, that they were "transferable only at the office of said company, by [the holders] or their attorney."

The plaintiffs, in their first count, demanded damages on account of the shares not having been transferred to them on the books of the company, according to the assignment; and in the second count, they claimed the dividends that had accrued upon the shares.

PUTNAM, J., delivered the opinion of the court. We think it cannot be maintained that the right to the shares in the capital stock of this corporation cannot be transferred without a literal compliance with the by-laws. It is personal property. 3 Dane's Abr. 108; 5 Dane's Abr. 157. It might be conveyed by will; it might descend from an intestate to his heir. It may be assigned without deed, by a delivery of the certificate with an indorsement upon it for a valuable consideration. *Quiner v. Marblehead Ins. Co.*, 10 Mass. R. 476. And in such cases the legatee, heir, or assignee would be entitled to have the transfer made in the books, and to a certificate of his property. A by-law which limits the transfer of the stock to be made only at the office personally or by attorney, and with the assent of the president, would be in restraint of trade and contrary to the general law of the Commonwealth, which permits the right to personal property and incorporeal hereditaments to be transferred in various other ways. The purchaser or other person entitled should make his right known to the corporation, that it may be entered upon their books; to the end that it may have proper evidence to whom the dividends or profits should be paid. *S. 127, 129, 130, 131, 132, 133*

*Refusal of corp may (treated as cor. stock etc) record in a  
act at law 117 §. 601 (Cal CCA 1902)  
Mass. S. v. Sh' at time - demands refusal 48 St 226 (94 04)*

*Made ...*



the parties, a transfer of shares not entered on the books of the company is invalid. The statute reads: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so as to show the name of the person by and to whom transferred, the numbers or other designation of the shares and the date of the transfer. . . . The books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount paid on their shares, and all transfers thereof. . . ." Code 1873, section 1078. The question before us is: Will a transfer made in any other way than that provided in the statute be effectual to transfer the shares as against a creditor of the transferor who has actual notice of such transfer? While this court has held that a transfer of shares not entered on the books of the company will not be valid as against an attaching creditor who has no actual notice of such transfer, the effect of actual notice in case it exists, has not been determined. *Lumber Co. v. Batavian Bank*, 71 Iowa, 270. In that case, in discussing the meaning of the statute, it was incidentally said: "If attaching creditors of the transferor had knowledge of the transfer, it may be that a court of equity would protect the transferee's rights. It has frequently been so held, but that question is not before us." We think the statute should be construed to mean just what it says. We are not authorized to insert another exception in the statute, which, in effect, we must do if we hold that the attachment lien is not superior to the claims of plaintiffs. Plaintiffs construe the statute as if it read: "The transfer of shares is not valid except as between the parties thereto, and except as between the transferee and an attaching creditor of the transferor who has actual notice of the transfer." That would be ingrafting upon the statute an exception it does not contain. The holding in the case just cited is followed in *Moore v. Opera House Co.*, 81 Iowa, 45. The case of *Bank v. Haney*, 87 Iowa, 106, relied upon by appellants, does not involve a transfer of stock, and has no application to the question here presented. The precise question before us was determined in the case of *Bank v. Hastings*, 7 Colo. App. 129 (42 Pac. Rep. 691). The statute of that state provides that "no transfer of stock shall be valid for any purpose, except to render the person to whom it shall be transferred liable for the debts of the company, unless it shall have been entered in the proper book of the company within sixty days from the date of the transfer, by an entry showing to and from whom it was transferred." General Statute, section 269. It was held that the requirement of the statute was absolute, and that the actual notice or knowledge of a creditor that a transfer had been made before his levy amounted only to knowledge that the transferees had, by their neglect to have the transfer entered upon the proper books, lost their right to the stock, and that it belonged to their transferor, and was subject to attachment at the suit of his creditors. Now, the right of an attachment or execution creditor to

take shares appearing in his debtor's name upon the company's books is derived from the act of the legislature, and we do not discover upon what principle courts can deprive a creditor of such right simply because he or the sheriff had actual notice of a transfer of the stock before the levy was made, when no such exception is to be found in the statute. 1 Morawetz, Corporations, section 199. Under statutes in effect like ours it has often been held that all transfers not entered on the books of the corporation are absolutely void, not because they were without notice, but because made so by statute. *In re Murphy*, 51 Wis. 519 (8 N. W. Rep. 419); *Bank v. Cutler*, 49 Me. 315; *Weston v. Mining Co.*, 5 Cal. 186; *Bank v. Folsom*, 7 N. M. 611 (38 Pac. Rep. 253). The statute provides that a transfer of stock shall not be valid, as to third parties, until it is regularly entered on the books of the company. Its language is explicit. It points out just what must be done to protect the purchaser of stock in his holding as against the claim of creditors of the seller. Its meaning is obvious, and no argument is needed to show the wisdom of its provisions. What might be the rule in case a transferee had exhausted all reasonable means in attempting to procure the officers of a corporation to make the proper entries of a transfer on their books, and they had failed and refused so to do, we need not determine, as no such case is before us. The provisions of the statute requiring an entry in the books of the company is imperative, and in no wise affected by the fact that the creditor seeking to obtain a lien upon the stock, or the officer holding the process, may have actual notice of the transfer before the levy is made.

D 126-125-149

Cal. 133/315.6. It is well known law in this St. that one who purchases at  
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 to have cft. such shares reassured to him as such purchaser.  
 If at a time, he purchases he acts in of two no & could stand cft. has  
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 serve notice on corp & he holds cft as such assignee or pledgee. cft can  
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 (324 ecc) that even no entry upon bks. corp such a cft is valid as vs all  
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 an intended purchaser one has a prior claim on stock even tho the  
 claim be not noted on bks. corp is sufficient - entry & pledge name  
 . . . see & pledge no. shares & the date: cft will be sufficient 277 of 144. m

Decree affirmed.

acc. to all the Mass. . . 11 states; contra. . . . .  
 in (ab. 2007) - despite rules, corp

fn. What is purpose, stat - If a record of act, benefit, public  
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## 151 BORLAND v. STEEL BROTHERS &amp; COMPANY, LIMITED.

[1901.] 1 *Chancery*, 279.

THE articles of association of the defendant contained provisions restraining the free alienation of shares; and the legality of these provisions was in question.

Article 49 provided that no share should, save as therein provided, be transferred to any person not being a manager or assistant, so long as any manager or assistant should be willing to purchase the same at the fair value. "Managers or assistants" were defined by the articles to be persons receiving remuneration from the company for managing or assisting to manage the business of the company at home or abroad otherwise than as a director only (but including a director also acting as manager or managing director).

By art. 50, in order to ascertain whether any manager or assistant was willing to purchase a share, the proposing transferor was to give a transfer notice to the company, specifying the sum which he fixed as the fair value, and such transfer notice was to constitute the company the transferor's agent for the sale of the share to any manager or assistant at the price so fixed.

Art. 52 provided that if the company should, within fourteen clear days after being served with such transfer notice, find a manager or assistant willing to purchase at the price aforesaid any share comprised in the transfer notice, and should give notice thereof to the intending transferor, he should be bound, on payment of the purchase-money, to transfer such share.

Art. 57 provided that on any manager or assistant ceasing to be such, or on his death or bankruptcy, he must, on receiving certain notice, transfer his shares.

Art. 58 provided that in every case where ordinary shares were held by a person not being a manager or assistant, the directors might at any time give to such person notice requiring him forthwith to transfer all or any of such shares, and unless within fourteen days afterwards he should give a transfer notice in respect thereof, he should be deemed to have given such notice in accordance with the articles, and to have specified the par value as defined by art. 53 as the fair value of the shares, and the subsequent proceedings might be taken on that footing.

FARWELL, J. It is said that the provisions of these articles compel a man at any time during the continuance of this company to sell his shares to particular persons at a particular price to be ascertained in the manner prescribed in the articles. Two arguments have been founded on that. It is said, first of all, that such provisions are repugnant to absolute ownership. It is said, further, that they tend to perpetuity. They are likened to the case of a settlor or testator who

settles or gives a sum of money subject to executory limitations which are to arise in the future, interpreting the articles as if they provided that if at any time hereafter, during centuries to come, the company should desire the shares of a particular person, not being a manager or assistant, he must sell them. To my mind that is applying to company law a principle which is wholly inapplicable thereto. It is the first time that any such suggestion has been made, and it rests, I think, on a misconception of what a share in a company really is. A share, according to the plaintiff's argument, is a sum of money which is dealt with in a particular manner by what are called for the purpose of argument executory limitations. To my mind it is nothing of the sort. A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount. That view seems to me to be supported by the authority of *New London and Brazilian Bank v. Brocklebank*.<sup>1</sup> That was a case in which trustees bought shares in a company whose articles provided "that the company should have a first and paramount charge on the shares of any shareholder for all moneys owing to the company from him alone or jointly with any other person, and that when a share was held by more persons than one the company should have a like lien and charge thereon in respect of all moneys so owing to them from all or any of the holders thereof alone or jointly with any other person." One of the trustees was a partner in a firm which afterwards went into liquidation, at a time at which it owed the company a debt which had arisen long after the registration of the shares in the names of the trustees. It was held that the shares were subject to the liens mentioned for the benefit of the company, notwithstanding the interest of the cestuis que trust which was said to be paramount. If there had been any substance in the suggestion now made, namely, that the right to the lien was the right to an executory lien arising from time to time as the necessity for it arose, it might have been put forward in that case; but the decision was based on a ground inconsistent with any such contention, namely, that the shares were subjected to this particular lien in their inception and as one of their incidents. Jesell, M. R., likened it to the case of a lease. Holker, L. J., said:<sup>2</sup> "It seems to me that the shares having been purchased on those terms and conditions, it is impossible for the cestuis que trust to say that those terms and conditions are not to be observed."

<sup>1</sup> 21 Ch. D. 302.<sup>2</sup> 21 Ch. D. 303.

Proviso in c. b. l. giving corp. option to refuse, if sh<sup>d</sup> on its b<sup>d</sup>s where holder is indebted to corp. & reggr. must b<sup>e</sup> l<sup>g</sup> to be x<sup>d</sup> by both before & after do n<sup>t</sup> apply on c. b. l. as to rx<sup>n</sup> a deceased sh<sup>r</sup> 117 F601 (Cal CCA).

Restrictions, first notified and then drawn to all to each person on the m<sup>th</sup> 9/10/99 (1911) sh<sup>r</sup>

§ 324. The R. v. Upchurch is of no importance as to the making of C's who do not create a promise to A to pay him or his x<sup>2</sup> or about a sum of money on a future event is good. The rule does apply to the top of C who created thus if the promise is in such a C should bequeath it to A on a remote contingency. EAST BIRMINGHAM LAND CO. v. DENNIS. Such bequest would be void.

Then it is said that this is contrary to the rule against perpetuity. Now, in my opinion the rule against perpetuity has no application whatever to personal contracts. If authority is necessary for that, the case of *Witham v. Vane*<sup>1</sup> is a direct authority of the House of Lords; and to my mind an even stronger case is that of *Walsh v. Secretary of State for India*.<sup>2</sup> A stronger instance of the unlimited extent of personal liability could hardly be cited; the Old East India Company in 1760, or thereabouts, entered into a covenant with the first Lord Clive, that in the event of the company ceasing to be the possessors of the Bengal territories they would repay to Lord Clive, his executors or administrators, a sum of about eight lacs of rupees, which had been transferred to them for certain particular purposes. The actual event did not happen till nearly a century later; and, as Lord Selborne pointed out in *Witham v. Vane*,<sup>1</sup> the question of perpetuity was put forward tentatively in argument in the House of Lords; but Lord Cairns with his usual discretion did not press it. 9 113. 182

None to create such contracts but why not as to their transfer

cf. Gray. Rule v. Perp. § 329 note\*

cf

## EAST BIRMINGHAM LAND CO. v. DENNIS.

1888. 85 Alabama, 565.<sup>2</sup>

APPEAL from the City Court of Birmingham, in equity.

Heard before the Hon. H. A. SHARPE.

The bill in this case was filed on the 13th April, 1888, by J. F. Dennis, against J. P. Mudd, and the East Birmingham Land Company, a private corporation; and sought to compel the transfer, on the books of the corporation, of a certificate for ten shares of stock, of which the complainant claimed to be the owner, and to compel the delivery of the certificate to him by said Mudd, who had possession of it under claim of ownership. The certificate was issued in the name of A. R. Dearborn, and was indorsed by him in blank. The complainant claimed that he had bought the certificate, with the blank indorsement thereon, from a holder who had acquired it by purchase from said Dearborn; and that it was lost by him, or stolen from him, without fault on his part. Mudd purchased the certificate, for full value, from Wilson, Sage & Clark, stock-brokers in Birmingham; and while denying complainant's ownership, claimed that he acquired a good title by the custom and usage of brokers and merchants in Birmingham. A decree *pro confesso* was taken against the corporation. On final hearing, on pleadings and proof, the court rendered a decree for the complainant; and this decree is now assigned as error, by each of the defendants separately.

<sup>1</sup> Challis on Real Property, 2d ed., App. V, p. 401.

<sup>2</sup> 10 H. L. C. 367.

\* Citations of counsel omitted. — ED.



SOMERVILLE, J. We concur in the conclusion reached by the judge of the City Court, that the appellee, Dennis, complainant in the bill, is the owner of the ten shares of stock which are the subject of litigation in the present suit. The testimony satisfactorily proves that the certificate of stock, indorsed in blank by Dearborn, who was the owner on the books of the defendant corporation, was the property of the appellee, and was taken or stolen from his possession, without any negligence on his part whatever, several months before it was purchased by the defendant Mudd, who innocently bought and paid value for it, some time in March, 1888.

The only question is, whether Mudd, who paid full value for this stock, without notice of the complainant's claim to it, acquired a title superior to that of complainant.

The established rule is that no person can ordinarily be deprived of his ownership of property save by his own consent, or his negligence. The only exception to this rule is the case of a *bona fide* purchaser for value, of negotiable paper. We have no reference, of course, to the taking of property for public uses by judicial condemnation, which may be done without the owner's consent.

It can not be contended, with any degree of plausibility, that, under the facts of this case, the complainant was guilty of negligence, or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking-house, whence it was abstracted by some unknown person, apparently, without any fault on his part.

Nor does any question arise involving the rights of a subsequent *bona fide* purchase of stock, from one shown to be owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner, and not registered on the books of the corporation within fifteen days, are declared by statute to be "void as to *bona fide* creditors, or purchasers without notice."—Code 1886 § 1671; *Fisher v. Jones*, 82 Ala. 117. If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant Dennis himself, by two or more intermediate transferees, the first of whom was a fraudulent holder without title. Whether Mudd's title to the stock, therefore, is superior to that of Dennis, depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as negotiable paper.

The rule is well settled, that a *bona fide* purchaser of a negotiable bill, bond or note, although he buys from a thief, acquires a good title, if he pays value for it without notice of the infirmity of his vendor's title. The authorities are clear in support of the view, that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper, and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the

absence of all negligence on the part of the owner, or his authority to make the sale. This question arose, and was decided by the New York Court of Appeals, in *Mechanics' Bank v. New York & New Haven R. R. Co.*, 13 N. Y. (1856), 599. It was there held, that such a certificate does not partake of the character of a negotiable instrument, and that a *bona fide* assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer, or order of the party to whom they are given." They were said to be, in some respects, like a bill of lading, or warehouse receipt, being "the representative of property existing under certain conditions, and the documentary evidence of title thereto." The most that can be said is, that all such instruments possess a sort of *quasi* negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.

In *Shaw v. Spencer*, 100 Mass. 382; s. c., 97 Amer. Dec., 1 Amer. Rep. 115 (1868), it was also decided that a certificate of corporate stock, transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name, must fill out the blanks, . . . so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares." The case of *Sewall v. Boston Water Power Co.*, 4 Allen, 282; s. c., 81 Amer. Dec. 701, decided by the same court a few years before, is referred to as a precedent in support of this conclusion.

The precise point in the present case was also decided in *Barstow v. Savage Mining Co.*, 64 Cal. 388; s. c., 49 Amer. Rep. 705, where it was expressly held that a *bona fide* purchaser of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. The decision was based on the fact, that such certificates are not negotiable instruments, but simply muniments of title, and evidences of the holder's right to a given share in the property and franchises of the corporation. It was observed, in regard to the matter of negligence, as follows: "But, if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit."

The same principle was applied to bills of lading, in *Gurney v. Behrend*, 3 Ellis & Bl. 622, decided by the English Queen's Bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The

Case = 50/412; 64/888. 4 Pac 1172.

Nature of the instrument of title to share in prop of such 50/412

correspondent, without authority, fraudulently transferred the bill for value; and it was held by Lord Campbell, that for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

The doctrine of *Barstow v. Savage Mining Co.*, *supra*, is well supported by authority, and, in our judgment, announces a correct principle of law, and we fully approve it. — *Woolley v. Sargeant*, 14 Amer. Dec., NOTE, on page 427, and cases there cited; Cook on Stock and Stockholders, sec. 368, 437, 192, 7, 10; 2 Daniel's Neg. Instr. (3d Ed.), § 1708g. It harmonizes entirely with the declaration of our statute, that shares of stock in private corporations "are personal property, transferrable on the books of the corporation" in accordance with the rules and regulation of the corporation. — Code 1886, § 1669; *Campbell v. Woodstock Iron Co.*, 83 Ala. 451.

There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock, indorsed in blank, is clothed with power as agent or trustee, to deal with such stock to a limited extent, and transfers it by exceeding his powers, or in breach of his trust. In such cases, it has often been held that the true owner, having conferred on the holder, by contract, all the external *indicia* of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner." — 2 Dan. Neg. Instr. (3d Ed.), § 1708g; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Mount Holly Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Prall v. Tilt*, 28 *Ib.*, 479; *Merchant's Nat. Bank v. Livingston*, 74 N. Y. 223. These cases rest on the principle, that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver, than a stranger who has been negligent in trusting no one." — *Allen v. Maury & Co.*, 66 Ala. 10.

It being an established principle of law, that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stock-brokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract. *Dickinson v. Gay*, 83 Amer. Dec. 656, and note, 664; *E. T., Va. & Ga. R. R. Co. v. Johnston*, 75 Ala. 576; *Lehman v. Marshall*, 47 Ala. 362.

The decree of the court below is in accordance with these views, and must be affirmed. D 11, 112, 112, 147.

Sh<sup>d</sup> even when indorsed in blank for purp. auth<sup>d</sup> & mak<sup>e</sup> an instrument of trans<sup>fer</sup> & signat<sup>ure</sup> as n. negot<sup>able</sup> 168 Mass 573; 64 265/18 (Ohio 02)  
where an owner showed his shares had been stolen or ev<sup>er</sup> burden rested on one claim<sup>ing</sup>  
as to be taken he was a b<sup>etter</sup> 17(107 190 1751)

108 P 711 (Cal 1910) acc = 137 Cal 625-31-

See Am Bar Ass<sup>n</sup> report. 563 + 574 of A Renewal of Certif<sup>icate</sup> x Cal 218 4mb

## 171 McNEIL v. TENTH NATIONAL BANK.

1871. 46 *New York*, 325.<sup>1</sup>

cf 42/129-147-8

APPEAL from a judgment of the General Term in the fourth district, affirming a judgment entered in Montgomery county, in favor of the plaintiff on the report of a referee.

The action was brought, to compel the surrender to the plaintiff of 134 shares of the capital stock of the First National Bank of St. Johnsville, which had been acquired by the appellant in the following manner:

In November, 1866, the plaintiff then being the owner of the shares in question, had an account with Goodyear Brothers & Durant, of the city of New York, stock brokers, relating to other stocks, which they had purchased and were carrying for him. For the purpose of securing any balance which might become due them on that account, the plaintiff delivered to and left with them, the certificate of the 134 shares in dispute, with a blank assignment, and power of attorney to transfer indorsed thereon, signed by the plaintiff, in the following words:

For value received, the undersigned hereby assigns and transfers unto . . . shares of the capital stock of the First National Bank of St. Johnsville, and do hereby constitute and appoint . . . true and lawful attorney, irrevocable for . . . and in . . . name and behalf, to make and execute all necessary acts of assignment and transfer required by the regulations and by-laws of said bank.

In witness whereof, I have hereunto set my hand and seal, this — day of —.

(Signed.)

B. McNEIL.

Sealed and sworn in presence of —.

On the 18th of June, 1868, at the city of New York, the appellant at the request of Goodyear Brothers & Durant, paid the sum of \$45,135 to Fred. Butterfield, Jacobs & Co., receiving from them certain securities, including the certificate and power for the 134 shares in question, which had been previously pledged by Goodyear Brothers & Durant to Fred. Butterfield, Jacobs & Co.

Goodyear Brothers & Co. were at that time insolvent, and indebted to the appellant. In pledging the plaintiff's shares, they had acted without actual authority from him, and without his knowledge. He was indebted to them, on the account for which the shares were pledged to them, in the sum of \$3,000 with interest from December 1, 1866; but the account had not been rendered, or any demand made.

The appellant, at the time of receiving the shares, had no knowledge of the plaintiff's interest therein.

<sup>1</sup> Arguments and part of opinion omitted. — Ed.

The cashier of the appellant, within a few days after receiving the certificate, assignment and power, filled in the blank in the assignment and power with "I. H. Stout, cashier, Tenth National Bank, New York, one hundred and thirty-four," and dated the same the 19th day of June, 1868, and sent the scrip to the First National Bank of St. Johnsville, for the purpose of having the shares transferred on the books accordingly; but such transfer was prevented by an order of injunction in this action.

cf 124/282 | The plaintiff demanded of the appellant a surrender of the scrip, on payment of the balance due by him to Goodyear Brothers & Durant; which demand was refused.

The value of the shares was \$17,420. The balance of the advance made by the appellant thereon (\$45,135, less the proceeds of the other securities received therewith, \$29,915.19), was \$15,219.81, besides interest.

When the certificate and power came to the possession of the appellant, they bore the proper revenue stamp, duly cancelled with the stamp of Goodyear Brothers & Durant, and the name of Ch. Goodyear as subscribing witness to the power. The referee found, that when the plaintiff delivered them, they were not stamped or witnessed, and that the plaintiff had never authorized those acts.

The referee found in favor of the plaintiff, and in conformity with his report, a judgment was entered, requiring a surrender of the scrip to the plaintiff, on payment by him of the \$3,000 and interest due by him to Goodyear Brothers & Durant.

This judgment was affirmed at General Term, and an appeal taken to the late Court of Appeals, where, after argument, that court was divided and a re-argument ordered. The case now comes up on the re-argument.

*E. L. Fancher*, for appellant.

*S. Hand*, for respondent.

RAPALLO, J. The pledge of the plaintiff's shares by his brokers, for a larger sum than the amount of their lien thereon, was a clear violation of their duty, and excess of their actual power. And if the effect of the transaction was merely to transfer to the appellant, through Fred. Butterfield, Jacobs & Co., the title or interest of Goodyear Brothers & Durant in the shares, the judgment appealed from was right.

It must be conceded, that as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend

upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence he caused or allowed to appear to be vested in the party making the conveyance. (*Pickering v. Busk*, 15 East, 38; *Gregg v. Wells*, 10 Adol. & El., 90; *Saltus v. Everett*, 20 Wend., 268, 284; *Mowrey v. Walsh*, 8 Cow., 238; *Root v. French*, 13 Wend. 570.)

The true point of inquiry in this case is, whether the plaintiff did confer upon his brokers such an apparent title to, or power of disposition over the shares in question, as will thus estop him from asserting his own title, as against parties who took *bona fide* through the brokers.

Simply intrusting the possession of a chattel to another as depositary, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted. (*Ballard v. Burgett*, 40 N. Y. R. 314.) "The mere possession of chattels, by whatever means acquired, *if there be no other evidence of property or authority to sell from the true owner*, will not enable the possessor to give a good title." Per DENIO, J. in *Covill v. Hill* (4 Den., 323).

But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised, are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle, from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power.

In the present case, the plaintiff delivered to and left with his brokers, the certificate of the shares, having indorsed thereon the form of an assignment, expressed to be made "for value received," and an irrevocable power to make all necessary transfers. The name of the transferee and attorney, and the date, were left blank. This document was signed by the plaintiff, and its effect must be now considered.

It is said in some English cases, that blank assignments of shares in corporations are irregular and invalid; but that opinion is expressed in cases where the shares could only be transferred by deed under seal, duly attested, and is placed upon the ground that a deed cannot be executed in blank.

Without referring to the American doctrine on that subject, it is sufficient to say that no such formality was requisite in this case. It was

only necessary to a valid transfer as between the parties, that the assignment and power should be in writing. The common practice of passing the title to stock by delivery of the certificate with blank assignments and power, has been repeatedly shown and sanctioned in cases which have come before our courts. Such was established to be the common practice in the city of New York, in the case of the *New York and New Haven Railroad Company v. Schuyler* (34 N. Y., 41), and the rights of parties claiming under such instruments were fully recognized in that case. And in the case of *Kortright v. The Commercial Bank of Buffalo* (20 Wend., 91, and 22 Wend., 348), the same usage was established as existing in New York and other States, and it was expressly held that even in the absence of such usage, a blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment; and that a party to whom it is delivered is authorized to fill it up, by writing a transfer and power of attorney over the signature.

It has also been settled, by repeated adjudications, that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc. (Angell and Ames on Corporations, 8th ed., § 354; *Bank of Utica v. Smalley*, 2 Cow., 770; *Gilbert v. Manchester Co.*, 11 Wend., 627; *Kortright v. Com. Bank of Buffalo*, 22 Wend., 362; *N. Y. and N. H. R. R. Co. v. Schuyler*, 34 N. Y., 80.)

In the case of *Kortright v. Com. Bank*, Chancellor WALWORTH, in a dissenting opinion, strenuously maintained, in conformity with his previous decision in *Stebbins v. Phoenix Ins. Co.* (3 Paige, 356), that by a transfer not on the books, the transferee acquired only an equitable right to or lien on the shares; and that, having but an equitable right or lien, he took subject to all prior equities which existed in favor of any other person from whom such assignment was obtained. (22 Wend., 352, 353, 355.) But his view was overruled by the majority of the court. The action was at law in assumpsit, brought by the holder of the certificate and power, for a refusal to permit him to make a transfer on the books, and the question of his legal title was necessarily involved in the case. The judgment therein must therefore be regarded as a direct adjudication that, as between the parties, the legal title to the shares will pass by delivery of the certificate and power (See 20 Wend., 362.)

This was reasserted in this court in the *New Haven Railroad Case* (34 N. Y., 80), notwithstanding what was said in the *Mechanics' Bank Case* (13 id., 625).

By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company, by the registered holder, to a *bona fide* purchaser (34 N. Y., 80); but in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have an action against the corporation, for allowing such a transfer in violation of his rights. (Id.) He also takes the risk of the collection of dividends by his assignor, or of any lien the corporation may have on the shares. But in other respects his title is complete.

The holder of such a certificate and power, possesses all the external *indicia* of title to the stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but, apparently, the legal title, and the means of transferring such title in the most effectual manner.

Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy toward persons who, in reliance upon those documents, have in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title, and claims, as against them, that he could not be deprived of his property without his consent, cannot he be truly answered that, by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact "substituted his trust in the honesty of his brokers, for the control which the law gave him over his own property," and that the consequences of a betrayal of that trust, should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?

These principles, in substance, were applied in the case of *Kortright v. The Commercial Bank*. But it is sought to distinguish that case from this; and it is argued, that there the certificate was intrusted to an agent, with authority from his principal to borrow money upon it for the benefit of his principal, and that he simply exceeded his authority by borrowing more than he was authorized to borrow, and absconding with the excess.

[After commenting on *Kortright v. Bank*.]

The principles of agency are, however, applicable to this case. In disposing of a pledge, the pledgee acts under a power from the pledgor.



cc 2991. One who has allowed another to assume & apparent ownership of prop. for  
& purpose - may carry off of it, cannot set up his own title to defeat a  
pledge. & prop made by other to a pledgee who rec'd prop as of record  
course - but & for value.

632

MCNEIL v. TENTH NATIONAL BANK.

The distinction between a lien and a pledge is said to be, that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded. (Story on Bailments, 7th ed., § 311, note 2; *Wasson v. Smith*, 2 B. & Ald., 489.) The pledgee in selling, is bound to protect the interests of the pledgor, and as to the surplus, represents the pledgor exclusively. Now, for what purpose was the apparent ownership and power of disposition of this stock vested in the brokers? Surely for the purpose of enabling them, effectually and summarily, to execute this power under certain conditions. If the power was absolute on its face, or if the whole legal title was by the instrument apparently vested in the pledgee, and the condition was secret, wherein does the case differ in principle from one of ordinary agency.

I am at a loss to conceive on what principle it can be claimed, that an apparent naked authority is more effectual to bind the party giving it, than an apparent ownership as well as authority.

I have reviewed the authorities at much more length than usual, by reason of the difference of opinion expressed in the late Court of Appeals in this case, and for the purpose of meeting the positions so ably maintained in the opinions, in favor of the respondent, delivered in the court below, and in the late court, on the former hearing.

My conclusion is, that the Tenth National Bank must, on the facts found, be deemed to have advanced *bona fide* on the credit of the shares, and of the assignment and power executed by the plaintiff, and is entitled to hold the stock for the full amount so advanced, and remaining unpaid after exhausting the other securities received for the same advance.

The points relative to the stamp and subscribing witness were fully answered in the opinions delivered on the first argument, and do not appear to have been the subject of dissent. I do not deem it necessary again to discuss them here.

The judgment of the General Term, and that entered on the report of the referee, should be modified, so as to allow the plaintiff to redeem, on payment of the balance due to the Tenth National Bank, on its advance of June 19th, 1868, and the costs of the action.

All concur except ALLEN and FOLGER, JJ, not voting.

8123

Calca. cf 03/428. Pl had caused certain effs to be trfd on books to X who endorsed them in blank & returned them to Pl when later stole them & sold to Y who was a deft. negl. of owner as a defence. - 64/288. cf 168 Mass 573 *Ashmun v. May* 13<sup>th</sup> 2d, 50  
Judgment modified  
Was the negl. of owner the prox. cause of the deceit practiced on Pl?  
cf Brokers power to pledge shares & carry on margin for his customer to the extent of his lien on such shares? 12 Am C. 563

142 Effect of Tr-f-  
 143 In fact  
 144 liability on subse  
 145 liability to asset.  
 244 liability for credits

McDONALD, RECEIVER, v. DEWEY.

1905. 202 United States, 510.

SECTION 5151 of the National Bank Act provides: "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The defendant transferred some of his shares in a national bank at a time when the bank was insolvent, and when he knew or ought to have known the fact. The Circuit Court of Appeals held there could be no recovery against the defendant without proof of the additional fact that the several transferees were likewise insolvent.

MR. JUSTICE BROWN. That the transfer of stock in corporations, even when in failing circumstances, should not be unduly impeded, is essential not only to the prosperity of such corporations and the value of their stock, but to the interest of stockholders who may desire for legitimate reasons to change their investments or to raise money for debts incurred outside the business of such corporation. *Bank v. Lanier*, 11 Wall. 369, 377. At the same time the frequency with which such transfers are made for the purpose of evading the double liability imposed by the National Banking Act, has given rise to a large amount of litigation turning upon their legality. In this connection certain propositions have been laid down by so many courts and in so many cases that they may be regarded as fundamental principles of law applicable to all cases of this character.

(1) That a party, who by way of pledge or collateral security for a loan of money, accepts stock of a national bank and puts his name on the registry as owner, incurs an immediate liability as a stockholder, and cannot relieve himself therefrom by making a colorable transfer of his stock to another person for his own benefit, as was done by the sale to Jewett in this case. *National Bank v. Case*, 99 U. S. 628; *Marcy v. Clark*, 17 Massachusetts, 329; *Nathan v. Whitlock*, 9 Paige, 152; *Cook on Stockholders*, § 263.

(2) The same result follows if the stockholder, knowing, or having good reason to know, the insolvency of the bank, colludes with an irresponsible person with design to substitute the latter in his place, and thus escape individual liability, and transfers his stock to such person. It is immaterial in such case that he may be able to show a full or partial consideration for the transfer as between himself and the transferee. *Bowden v. Johnson*, 107 U. S. 251.

Upon the other hand, in *Whitney v. Butler*, 118 U. S. 655, certain stockholders employed an auctioneer to sell their shares at public auction. They were bidden in by a purchaser who paid the auctioneer

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 asset becomes a debt at a time - c call even tho payd later 113 3 199

for them and received from him the certificate of stock with a power of attorney to transfer the same in blank. The auctioneer paid the money to the original owner of stock, but no formal transfer was made on the books of the bank. Shortly afterwards the bank became insolvent and went into the hands of a receiver, who made an assessment upon the original stockholders. We held that the responsibility of the stockholders ceased upon the surrender of the certificate to the bank, and the delivery to its president of a power of attorney to transfer the stock on the books of the bank. The controlling considerations were the good faith of the stockholders in making the sale, believing the bank to be solvent, and the fact that they had done all that they could reasonably be expected to do to make a valid sale of the stock and a transfer of the certificate on the stock register.

Under the English law a shareholder may transfer his shares to an irresponsible party for a nominal consideration, though the sole purpose of the transfer be to escape liability, provided the transfer be out and out, and not merely colorable or collusive, with a secret trust attached. Under such circumstances the person making the transfer is released from liability, both as to corporate creditors and the other shareholders. Cook on Stockholders, § 266; 2 Morawetz on Private Corporations, § 859.

The law is quite different in this country. At the same time the original stockholder cannot be held liable, unless the bank were practically insolvent at the time the transfer was made, and its condition was known or ought to have been known to the stockholder making the transfer. If the bank were in fact solvent and able to pay its debts as they matured when the transfer was made, the creditors having ample security in the solvency of the bank, have no special interest in knowing who the stockholders are, since their only recourse to them would be in the remote contingency of the insolvency of the bank. The transferrer can only be held liable if the bank be insolvent, and such insolvency be known, or ought to have been known, to him from his relations to the bank, since the transfer is *prima facie* valid, and shifts to the transferee the burden of the responsibility, which can be laid upon the original stockholder only in case of bad faith, or evidence of a purpose to evade liability.

This bad faith may be shown by the fact that the bank was known to him to be insolvent; but notwithstanding this the transfer would be valid if made to a person of known financial responsibility, since the creditors could not suffer by the substitution of one solvent stockholder in place of another. The Court of Appeals, however, went further and held that the transfer would be valid unless made to an irresponsible person unable to respond to an assessment, whose financial condition was known, or ought to have been known, to him.

[After reviewing the authorities.] We think it a proper deduction from the prior cases, and such we hold to be the law, that the gist of the liability is the fraud implied in selling, with notice of the insol-

veny of the bank and with intent to evade the double liability imposed upon the stockholder by the National Banking Act. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability. The fact that the sale was made to an insolvent buyer is doubtless additional evidence of the original fraudulent intent, but would not be in itself sufficient to constitute fraud without notice of the insolvency of the bank. The stockholder is not deprived of his right to sell his stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank. This was practically the ruling in *Earle v. Carson*, in which we held that a *bona fide* sale would not be void, though the vendee were insolvent, if the fact of such insolvency were at the time unknown to the seller. The case, of *Earle v. Carson*, so far from lending countenance to the argument of the appellees, bears strongly in the opposite direction.

The solvency of the vendee, however, is pertinent in showing that no damage could have resulted to the creditors of the bank by the transfer. Though not a necessary part of the plaintiff's case, it may be a complete defense, if it be shown that the sale, however fraudulent, was made to a vendee who was as able to respond to the double liability as was the vendor. The proposition that the executors are not responsible because the sales were made to solvent vendees, being defensive in its character, the burden of proof was upon them. In this particular the case is not unlike that of an ordinary action upon a contract, where the plaintiff relies upon the contract and the breach, and sues for such damages as may be reasonably supposed to follow therefrom. But it may be shown in defense that no damages really resulted, as, for instance, in an action for services, that plaintiff might have obtained other employment at the same wages, or, in an action for a failure to deliver goods, that plaintiff might have gone into the market and purchased other goods at the same price at which the defendant had agreed to sell them. In such case defendant assumes the burden of proving that no damage in fact resulted. The argument in this case really is that the receiver was bound to show, not only that Dewey was guilty of fraud, but that damages necessarily resulted and that he knew that fact. The reply is that the fraud was consummated by the sale of the stock of a bank known to be insolvent, with intent to evade liability, and that the fraud is not less though the transferees happened to be solvent, but that their solvency may be proved to rebut the presumption that injury resulted to the creditors from the transfers.

While there is no express finding of the Court of Appeals (though there was in the Circuit Court) that Dewey knew, or should have known, of the insolvency of the bank at the time of the transfer, and that the transfer was made with the intent to evade his double liability as stockholder, the decree of both courts is based upon this assumption; and as stated in the dissenting opinion "that the final

suspension of the bank, though it occurred two years and five months after Dewey's transfer of stock, is traceable, in the line of cause and effect, to the insolvency of the bank at the time of the transfer." We do not understand these facts to be seriously disputed.

139/235 of 154/52 71-2; 157,625  
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 T.B. Look up Morris, Bm 74/67-74  
 of 235 R.R. 566.7.

## BURROUGHS v. THE NORTH CAROLINA RAILROAD COMPANY.

*Who owns div? upon 1st day of the holder on 1st day the pay- as per Co*  
 1872. 87 North Carolina, 876.

RODMAN, J. On 16th February, 1870, the North Carolina Railroad Company declared a dividend by the following resolution: "The Board of Directors of the North Carolina Railroad Company do declare an annual dividend of six per cent on the capital stock of this company, for the fiscal year ending the 31st of May, 1870. Three per cent to be paid on 1st April, and three per cent payable on the first day of July, 1870, and the transfer books be closed from first day of March to the first of April, and from the first day of June until the first day of July."

On the 17th February, the plaintiffs, in writing in the usual form, at the foot of their certificate for thirty-four shares of stock in the company, transferred the same to Samuel H. Wiley for value, and authorized F. A. Stagg, attorney, to transfer the same on the books of the company. The transfer was accordingly made on the 21st February. The certificate of stock to the plaintiffs was cancelled, and a new certificate issued to Wiley. On the same day plaintiffs notified the company that they claimed the dividend declared on 16th February. The company, nevertheless, paid the same to Wiley, and this action is brought to recover it. One would suppose, that in a case which must be of frequent occurrence, there would be proved some established usage, or that some decided cases could be found fixing the rights of the parties. If there be any established usage, either general or special to this corporation, there has been no evidence of it offered in this case. And the learned counsel inform us that they have been able to find no authority whatever on it. The absence of authority is the more remarkable, as the rule as to a dividend following the stock or not, under the present circumstances, would seem to be of a general nature, not confined to sales, but covering the case of a life tenant with remainder, when the life tenant dies after the dividend is declared, and before it is payable, and the case of a will bequeathing stock when the testator dies under the like circumstances.

Before proceeding to the particular consideration of this case, it is necessary to observe:—

*The reg<sup>d</sup> holder at time div. is declared is one in whom so far as Co is concerned it is div. rests. This even when div. is to be pd later But many co- declare a div. in favor of stock<sup>s</sup> & record at time just in future pay<sup>t</sup> at a still later date. The legal right then rests in those holders & record not at time of pass<sup>g</sup> resolution or of div. paid but at time of co for determining it. Prm. co.*

As = before & after - it is a matter of mutual agreement. If no agreement, presumption is that all dividends declared after March 1, 1880, where it is out, and they are declared might have been earned, belong to the holder (see 9x D 24) & all dividends declared prior to that even if paid after would go to the holder. 112 NY 530

BURBOUGHS v. THE NORTH CAROLINA RAILROAD COMPANY. 637

1. It was clearly within the power of the seller and purchaser of the stock in this case, to have contracted with respect to the dividend declared on the day before. But,

2. If we assume for the moment, that the effect of the resolution, declaring the dividend, was to make it payable to whoever should appear by the books of the company to be the owner of the stock on the days on which it was payable, then, notwithstanding any different contract between the plaintiffs and their vendee, the company was justified in paying to the vendee, and the redress of the plaintiffs would be by an action against their vendee for money had and received.

It is important to notice that the question is, not as to the contract between plaintiffs and Wiley, but, to whom did the company agree to pay the dividend; for if the company agree to pay to one who turned out to be Wiley, its liability cannot be affected by any collateral agreement between the plaintiffs and Wiley (even if there were express proofs of such) without its consent. Without adverting to the principle, that the contract between plaintiffs and Wiley must be supposed to have been made in reference to the resolution of the day before, as to which it does not appear that either party had any advantage in point of knowledge; yet, in the absence of a contrary agreement, the sale must necessarily have been of the subject-matter with its rights and incidents at the date, or perhaps when the transfer should be completed.

So that the true question is, what was the effect and meaning of the resolution? Did it mean that the dividend should be payable to those who held the stock on 15th February, or to those who should hold it on 1st April? If the resolution had been clear and explicit in either sense, I conceive there could be no room for a controversy. Being of uncertain meaning, the courts have to give it a certain one. But whatever shall be determined to be its meaning in law, that must be taken to be as plainly its meaning as if it had been expressly written so.

What was the object in declaring the transfer books of the company closed from 1st March to 1st April?

If the dividend was intended to be payable to any one who was the holder on 16th February, there could be no <sup>sup</sup> in closing the books. In any case, upon a demand for payment, it would only be necessary to see from the books who was the holder on that day. But if the usage be, to put the dividend on the books of the company to the credit of the holders on 1st March, we can see a reason for closing the books, viz., to give time for the company to make out its accounts with its stockholders on that day. Suppose an assignment of stock between 1st March and 1st April, would the company be bound to notice it, in reference to a dividend payable 1st April? I think not. 2134, 158

## IN RE BAHIA &amp; SAN FRANCISCO RAILWAY COMPANY.

1868. *Law Reports, 3 Queen's Bench, 584.*

Claim is on a  
 cert issued by Co  
 to claimants  
 vendor

MISS TRITTIN was a shareholder in the Bahia & San Francisco Railway Company. The company accepted a transfer upon which her name had been forged, and issued new certificates which were sold to bona fide purchasers, Mr. Burton and Mrs. Goodburn.

The questions for the opinion of the court were: 1. Whether, as against the company, Mr. Burton and Mrs. Goodburn are entitled to the said shares in the company, or an equivalent number. 2. Whether they are entitled to any and what damages to be paid to them by the company under the above circumstances.

COCKBURN, C. J. I am of opinion that our judgment must be for the claimants. If the facts are rightly understood, the case falls within the principle of *Pickard v. Sears* and *Freeman v. Cooke*. The company are bound to keep a register of shareholders, and have power to issue certificates certifying that each individual shareholder named therein is a registered shareholder of the particular shares specified. This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares. It is stated in this case that the claimants acted bona fide, and did all that is required of purchasers of shares; they paid the value of the shares in money on having a transfer of the shares executed to them, and on the production of the certificates which were handed to them. It turned out that the transferors had in fact no shares, and that the company ought not to have registered them as shareholders or given them certificates, the transfer to them being a forgery. That brings the case within the principle of the decision in *Pickard v. Sears*, 6 Ad. & E. 469 (E. C. L. R. vol. 33), as explained by the case of *Freeman v. Cooke*, 2 Ex. 654, 18 L. J. Ex. 114, that, if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact.

Co estop

The only remaining question is, what is the redress to which the claimants are entitled. In whatever form of action they might shape their claim, and there can be no doubt that an action is maintainable, the measure of damages would be the same. They are entitled to

be placed in the same position as if the shares, which they purchased owing to the company's representation, had in fact been good shares, and had been transferred to them, and the company had refused to put them on the register, and the measure of damages would be the market price of the shares at that time; if no market price at that time, then a jury would have to say what was a reasonable compensation for the loss of the shares.

BLACKBURN, J. — I am of the same opinion. When joint stock companies were established, the great object was that the shares should be capable of being easily transferred; and the legislature has made provision by 25 & 26 Vict. c. 89, s. 25, that the company shall keep a register of the members, and when the capital is divided into shares, each share is to be distinguished by a number, and the shares held by each member is to be specified, and the dates at which each person's name was entered on the register. In order to keep up such a register, the company must alter its register whenever a transfer of shares is made, on the application and payment of a certain sum to them by the person to whom the shares are alleged to be transferred. And the first thing the company would have to do when a transfer was tendered to them, would be to inquire into its validity; but a company may be deceived, and induced, as the company were in the present case, without any negligence, to receive as genuine a forged transfer. They accordingly made an alteration in the register, and made it in fact inaccurate by putting the names of Stocken and Goldner on the register as the holders of particular shares, when in fact they were not so. The statute (s. 31) further provides that the company may give certificates, specifying the shares held by any member; and the object of this provision is expressly stated to be that this certificate should be *prima facie* evidence of the title of the person named to the shares specified; and the company, therefore, by granting the certificate, do make a statement that they have transferred the shares specified to the person to whom it is given, and that he is the holder of the shares. If they have been deceived and the statement is not perfectly true, they may not be guilty of negligence, but the company and no one else, have power to inquire into the matter; and it was the intention of the legislature that these certificates should be documents on which buyers might safely act. Now, on the facts of this case, although according to the practice on the stock exchange, the claimants did not originally contract for these particular shares, the money was paid by them or their broker on the execution by Stocken and Goldner of a transfer, and on the certificate under the seal of the company being handed over to them that Stocken and Goldner were the holders of these particular shares; and it is quite clear that a statement of a fact was made by the company, on which the company, at the very least, knew that persons wanting to purchase shares might act. And the claimants having *bonâ fide* acted upon that statement, and suffered damage, can they recover from the company? I think they can, on the principle enunciated in *Freeman v. Cooke*, 2 Ex. 654, 18

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L. J. Ex. 114. Suppose an action by the claimants against the company, asserting that the shares were the plaintiffs' and that the company refused to pay them the dividends and deprived them of the use of the shares, in effect an action of trover. The only plea would be that the plaintiffs were not the true owners of the shares, and there would be a replication by way of estoppel, that the company were estopped from saying that the plaintiffs were not the owners, because they had purchased on a statement of title made by the company, and intended by them to be acted upon; this would clearly amount to an estoppel within the rule defined in *Freeman v. Cooke*, 2 Ex. 654, 18 L. J. Ex. 114. The claimants, therefore, would be entitled to a verdict, and it follows that they are entitled as damages to the value of the shares at the time they were converted; that is, at the time when Miss Trittin interfered and claimed the shares.

MELLOR, J. — I am of the same opinion. I think the right of action cannot be grounded on negligence; but that the facts do amount to an estoppel on the company from denying the claimants' title. The company need not register a person as a member, under a transfer of shares of which they have any doubt; but can leave the transferee to come to the Court and make out his title. In the present case the company acted apparently without negligence, on the production of the transfer by the broker, and having sent a letter to Miss Trittin and received no answer, they caused the transferees to be registered, and gave them a certificate under seal, clearly intending them to use it in the market as a voucher or statement that they were the holders of the particular shares. The claimants accordingly purchase the shares, but it turns out that they acquired no title, and their names are struck off the register. I cannot but think that a person must have a remedy against a company for wrongfully striking his name off the register, so as to prevent his having the advantage of the shares he had purchased, and in such an action by the claimants the estoppel would arise against the company. The measure of damages would be the value of the shares at the time they ceased to be recognized as shareholders. Whether or not the company may have a remedy over against Stocken and Goldner it is unnecessary to consider.

LUSH, J. — I am also of the same opinion. It is not stated what the usual course of business is, but only that the shares were purchased in the usual course. I take it, the claimants having bargained in the share market for a certain number of shares each, they were offered a transfer of the shares which had been transferred by a forged transfer to Stocken and Goldner, the certificate at the same time being handed to them before the completion of the purchase, and by this certificate, in the usual form and under the seal of the company, it is certified that Stocken and Goldner are the registered holders of the specific shares, giving the numbers. Now there is no doubt that the certificate was given by the company to Stocken and Goldner in order that they might use it in the usual way in which such certificates are used, viz., as a

*no doubt to 3rd on eff given them - they must see that their eff is genuine - cf 71 Mo 467*

voucher to a purchaser of their names being on the register. And the claimants having acted on this statement by the company, there arises an estoppel as against the company, prohibiting them from denying that what it states is true. And the question then is, what does the certificate mean? Does it mean merely, that Stocken and Goldner are on the register, and the company have done their best to ascertain that they are entitled to the shares, but cannot say whether they are so entitled? Or does it amount to a statement that the company take upon themselves the responsibility of asserting that they are the registered shareholders entitled to the specific shares? I think the certificate must amount to the latter assertion. It is the company who are to keep and look after the register, and they are the only persons who have control over it, and they can refuse to register a person until he shows that he is legally entitled. Having, therefore, put the names of Stocken and Goldner upon the register, and granted them a certificate, the company are estopped after that statement has been acted upon, and cannot deny that those persons were the legal holders of the particular shares which have been transferred to the claimants. The claimants, therefore, are entitled to recover from the company the value of the shares at the time when they were deprived of them.

*Brown, Q. C.*, asked that the Court would award interest in addition; he stated that the company paid 7 per cent. dividend, and that the company refused to recognize the claimants as shareholders on the 10th of October, 1866.

*PER CURIAM.*—The rule will be that the company do pay to the claimants the value of their respective shares on the 10th of October, 1866, at interest from that time at 4 per cent., as damages, together with costs.

*Rule absolute accordingly.*

117, 105, 134, 105, 108, 148, 149  
acc 106 7-55 164 211 323

# 17 BOSTON & ALBANY RAILROAD v. RICHARDSON.

1883. 125 Massachusetts, 473.

*MORTON, C. J.* This case, which is an action of contract with a count in tort, presents an important question, referred to, but not decided, in *Machinists' National Bank v. Field*, 126 Mass. 345.

In January, 1876, Mrs. Pratt owned five shares of the stock of the Boston and Albany Railroad Company, and held a certificate running in her name. Her son forged her name to a blank power of attorney, printed upon the back of the certificate, and delivered it to one Field, a broker. Field sold the shares to the defendants, and delivered to them the certificate with the forged signature thereon. The defendants presented it to the transfer clerk of the plaintiff by Brown, their clerk, who filled up the blanks so as to make it a power of attorney to Brown to transfer the shares to Richardson, Hill and Company, the

Claim is on a  
cert issued by  
Co to Mrs P  
but sold to her  
son a forged  
signature to  
claimant who  
is now sued by Co

defendants. Throughout, Brown was acting as the agent and on behalf of the defendants. Thereupon the transfer clerk permitted Brown to transfer the shares upon the books of the corporation, and issued a new certificate to the defendants. Subsequently, and before the discovery of the forgery, the defendants sold the stock to a third person, and, at their request, the corporation issued a new certificate to the purchaser.

Upon these facts, it is clear that Mrs. Pratt never parted with her property in the shares, and therefore the plaintiff was obliged to procure five shares of its corporate stock, and issue a certificate to her, and also to pay her the dividends upon the five shares. *Pratt v. Taunton Copper Co.*, 123 Mass. 110, and cases cited. It is also settled that the corporation has no remedy against the person who purchased of the defendants, because, as to him, the corporation is estopped to deny its certificate issued to the defendants and transferred to the purchaser. *Machinists' National Bank v. Field*, *ubi supra*, and cases cited. The question in this case is whether it has a remedy against the person who presented a forged transfer or power of attorney, upon the faith of which it issued to such person a new certificate.

This question has never been directly decided in this Commonwealth, but the adjudged cases furnish analogies which aid us in its solution. It is familiar law that, in a sale of chattels, a warranty of title is implied, unless the circumstances are such as to give rise to a contrary presumption. *Shattuck v. Green*, 104 Mass. 42. The possession and offer to sell a chattel is held equivalent to an affirmation that the seller has title to it. This is founded upon the reason that men naturally understand that a seller who offers a chattel for sale owns it.

The same rule has been extended to the case of a sale of a promissory note. The seller impliedly warrants that the previous signatures are genuine. *Cabot Bank v. Morton*, 4 Gray, 156. *Merriam v. Wolcott*, 3 Allen, 258.

So it has been held that, if one, honestly believing himself to be authorized, acts as agent for another, and procures money or goods upon the credit of his supposed principal, and it turns out that he is not authorized, he is liable for the value of the money or goods. Chief Justice Shaw says: "If one falsely represents that he has an authority, by which another, relying on the representation, is misled, he is liable; and by acting as agent for another, when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized without knowing the fact to be true, it is in the nature of a false warranty, and he is liable." *Jefts v. York*, 10 Cush. 392. The chief justice adds: "But in both cases his liability is founded on the ground of deceit, and the remedy is by action of tort." We do not understand him as intending to say that the only remedy is the technical action of deceit, and that a guilty knowledge must be proved. He used the word "deceit" in the sense of tort. In numerous other cases,

the remedy is said to be an action on the case for falsely assuming to be an agent. *Bartlett v. Tucker*, 104 Mass. 336, and cases cited. And in the recent case of *May v. Western Union Telegraph*, 112 Mass. 90, it was held that the proper remedy is not an action of deceit; but "it is an action in the nature of a false warranty against one acting as agent, who represents that he has authority when he has not. Whether such representation is made in terms, or tacitly and impliedly, he supposing but not knowing the fact to be true, he is liable to the person misled." We can see no good reason why an action of contract upon the implied warranty should not be maintained, in the same manner as it may be upon the implied warranty in the sale of chattels. *Randell v. Trimen*, 18 C. B. 786. *Richardson v. Williamson*, L. R. 6 Q. B. 276. *Baltzen v. Nicolay*, 53 N. Y. 467. But it is not necessary to discuss this, because in the case at bar there is both a count in contract and a count in tort in the nature of case, for falsely assuming to act as an agent.

Perhaps these considerations are sufficient to dispose of this case; but it seems to us that the result would be the same if Pratt had signed the transfer on the back of the certificate, instead of the power of attorney. The difference between the two modes of effecting a transfer is theoretical rather than practical. There is in either case a similar implied representation or warranty.

If one buys stock and takes a transfer, and presents the certificate to the corporation and demands a new one, he thereby impliedly represents that he is entitled to the new certificate. He demands it as his right; this implies that he is the owner and has a right to it. The corporation has the right to understand him as asserting this. It is not bound to question or investigate the genuineness of the transfer, and see if the purchaser has not been defrauded. When the purchaser presents his transfer and certificate, the transfer officer naturally understands that he claims the transfer to be valid, and to have a right to a certificate; he has the right to act as if this had been said in terms. And if, relying upon such tacit and implied representations, the corporation suffers a loss, the purchaser who misled it is liable. 148, 149

## CHAPTER III.

## OWNERSHIP BY A CORPORATION OF SHARES OF ITS OWN STOCK, OR OF THE STOCK OF OTHER CORPORATIONS.

58 2d Pl. R. 299-303. Corp as shh. + 2d 581-3 646.

40 " 296. (1901) 1st own shh. 582, P. 299-303

Purch by Corp of its own shh<sup>2</sup> 1 Calif 267 of 164/464  
of CCC 243-4

## DUPEE v. BOSTON WATER POWER CO.

A corp can purchase 1878. 114 Mass. 37.<sup>1</sup>  
known shares. (giving land for them)

BILL IN EQUITY by minority stockholders in defendant corporation, to restrain the corporation from selling land and receiving its own stock in part payment.

*C. B. Goodrich*, for plaintiffs. Selling land of the corporation, and receiving payment of the purchase money in whole or in part, at the election of the purchaser, in the shares of the capital stock of the corporation, is a breach of trust. This is especially true when it is proposed to receive the shares at a sum much above the market value. It operates to the prejudice and injury of such of the shareholders as are unable or unwilling to purchase the land owned by the corporation. It is in effect a dividend, or return of capital to a portion of the stockholders, to the exclusion of others. It effects a reduction of the capital stock of the corporation in a manner not authorized by law. The defendant corporation has no power under its original charter to reduce its capital stock; if it has such power, it is derived from Sts. 1870, c. 224, § 24, and 1871, c. 110. The Boston Water Power Company has no authority to reduce its capital stock by a purchase thereof for the purpose of cancellation, or for a resale thereof. A reduction of its capital stock, if allowable in any case, must be by a particular course of proceeding provided by statutes, cited above.

[Remainder of argument omitted.]

*D. Foster & G. W. Baldwin*, for defendants.

*COLT, J.* This case is heard upon bill and answers. No issue is joined upon the truth of the defendants' allegations, and the only questions of law are those which arise upon the facts thus presented.

At an annual meeting of the defendant corporation it was voted that the directors be authorized, "if in their judgment the interest of the company will be thereby promoted, to receive in part payment for

<sup>1</sup> Statement abridged. Only so much of the opinion is given as relates to a single point. — Ed.

the land of the company hereafter to be sold, the stock of the company, at such price for the land and the stock as may be deemed for the interest of the stockholders." Under this authority the directors advertised a number of lots belonging to the corporation to be sold at public auction, and paid for, at the option of the purchaser, one half in cash, and one half in the stock of the corporation at a price named [viz., \$75 per share]. There is no other action of the corporation or its directors, past or contemplated, relied on to support the bill. The prayer is that the defendants be enjoined and restrained from selling the company's lands by auction, or otherwise, in the mode proposed.

There is nothing in this vote of the corporation, or in the action of the directors, which amounts to a reduction of capital, or will amount to it, if the proposed sales take place. That must depend on future corporate action.

The only questions left upon the pleadings are, whether sales may be lawfully made of the company lands under the vote of the stockholders, at the annual meeting, to be paid for in its own stock at a price agreed, which price does not exceed its intrinsic value as based upon a reasonable estimate of its corporate property; and whether the agreement to fill the lots sold to the usual grade can be lawfully entered into.

In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers. *Leland v. Hayden*, 102 Mass. 542. *American Railway-Frog Co. v. Haven*, 101 Mass. 898. *Nesmith v. Washington Bank*, 6 Pick. 324, 329. *Coleman v. Columbia Oil Co.* 51 Penn. State, 74. *City Bank of Columbus v. Bruce*, 17 N. Y. 507. *Ex parte Holmes*, 5 Cowen, 426.

We cannot see that the rights of any of the stockholders will be illegally prejudiced by the proposed receipt of the shares in payment for its land. -

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outrightly Cap &  
the Co does not.*

1874 4572cc

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*Bill dismissed with costs.*

## TREVOR v. WHITWORTH.

1887. *Law Reports, 12 Appeal Cases*, 409.<sup>1</sup>

## APPEAL from a decision of the Court of Appeal.

James Schofield & Sons Limited were incorporated in 1865 under the Companies Act 1862 with a capital of £150,000 in 15,000 shares of £10 each. The objects, as stated in the memorandum of association, were to acquire and carry on the business of certain flannel manufacturers, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto, or proper to be carried on in connection therewith.

The memorandum did not authorize the company to purchase its own shares; but the articles of association purported to authorize such purchases.

The company having, in 1884, gone into liquidation, a claim was ~~made against the company by the respondents, as executors of Whitworth, a deceased shareholder, for the balance of the price of Whitworth's shares sold by the executors to the company in 1880, and not wholly paid for.~~

The Vice Chancellor of the County Palatine of Lancaster disallowed the claim.

The Court of Appeal (Cotton, Bowen and Fry L.JJ.) reversed this decision and allowed the claim. Against this last decision the official liquidators now appealed.

*Rigby Q. C.*, and *O. Leigh Clare*, for appellants.

*Romer Q. C.*, and *A. C. Maberley*, for respondents.

LORD HERSCHELL.

I pass now to the main question in this case, which is one of great and general importance, ~~whether the company had power to purchase the shares.~~ The result of the judgment in the Court below is certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states, as the objects for which the company is established, the acquiring certain manufacturing businesses and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be

<sup>1</sup> Statement abridged. Arguments and portions of opinions omitted. — Ed.

in any way auxiliary thereto, or proper to be carried on in connection therewith.

It cannot be questioned, since the case of *Ashbury Railway Carriage and Iron Company v. Riche*,<sup>1</sup> that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect. These propositions are not and could not be impeached in the judgments of the Court of Appeal, but it is said to be settled by authority, that although a company could not under such a memorandum as the present, by articles authorize a trafficking in its own shares, it might authorize the board to buy its shares "whenever they thought it desirable for the purposes of the company," or "in cases where it was incidental to the legitimate objects of the company that it should do so." The former is Lord Justice Cotton's expression; the latter that of Lord Justice Bowen.

I will first consider the question apart from authority, and then examine the decisions relied on.

The Companies Act 1862 requires (sect. 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount; and provides (sect. 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association."

What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.

Experience appears to have shewn that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Act of 1867 provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to shew how inconsistent with the

<sup>1</sup> Law Rep. 7 H. L. 653.



very constitution of a joint stock company, with limited liability, the right to reduce its capital was considered to be.

Let me now invite your Lordships' attention to the facts of the present case. The company had purchased, prior to the date of the liquidation, no less than 4142 of its own shares; that is to say, considerably more than a fourth of the paid-up capital of the company had been either paid, or contracted to be paid, to shareholders, in consideration only of their ceasing to be so. I am quite unable to see how this expenditure was incurred in respect of or as incidental to any of the objects specified in the memorandum. And, if not, I have a difficulty in seeing how it can be justified. If the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its capital, but it was suggested that it might do so if that were not the object, but it was considered for some other reason desirable in the interest of the company to do so. To the creditor, whose interests, I think, sects. 8 and 12 of the Companies Act were intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock available to meet the demands of the creditors.

What was the reason which induced the company in the present case to purchase its shares? If it was that they might sell them again, this would be a trafficking in the shares, and clearly unauthorized. If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof) is that this was intended to be a family company, and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested in the old firm, or of those persons whom the directors thought they would like to be amongst this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the company's money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the busi-

14 C. App. 522. 6. *Shaw v. Shaw* (1887) 12 Q.B. 1. The validity of a contract entered into as a loan to a company of its own stock is not argued or presented. Conceding that such a contract is valid, it is not the less true that it is susceptible of construction that -

ness to be more profitably or satisfactorily carried on? I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these, they could legitimately expend the moneys of the company to any extent they please in the purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase the shares, and not out of the funds of the company.

17 BOOTH v. ROBINSON. Bill by minority stockholders vs. directors for mismanagement. In was it possible illegal for the directors to purchase stock as Corp. stock of Corp. of which they were officers.

1881. 55 Maryland, 419.<sup>1</sup>

#### APPEAL from the Circuit Court.

Bill in equity, by certain stockholders in the Powhatan Steamboat Company, against defendants, some of whom were directors in that corporation, to obtain redress for wilful and fraudulent mismanagement of the corporate affairs. Answers were filed, and evidence introduced. It appeared that another corporation, the Steam Packet Company, had purchased about one third of the stock of the Powhatan Company, and that thereafter two of the directors of the Steam Packet Company had been elected directors in the Powhatan Company. It was charged that said directors were parties to a combination formed for the purpose of mismanaging and ruining the Powhatan Company; and that such ruin had been finally accomplished.

*R. W. Baldwin, Geo. Hawkins Williams, and S. Teackle Wallis, for appellants.*

*Randolph Barton and I. Nevett Steele, for appellees.*

ALVEY, J.

The first question is, as to the power of the Steam Packet Company to purchase and hold the stock of the Powhatan Company. This, it is contended by the plaintiffs, could not be done without express authority by law. But while some courts have so held, the great weight of authority is the other way. There is nothing in the charter of the Steam Packet Company, or in the nature of its business, that would, in the slightest manner, forbid the exercise of such power; and having money to loan or invest, there would appear to be no good reason why it might not invest in the stock of other corporations as well as in any other funds, provided it be done *bona fide*, and with no sinister or unlawful purpose. The courts of England at one time

<sup>1</sup> Statement abridged. Arguments omitted. Only so much of the case is given as relates to a single point. — Ed.

strongly opposed the right of one corporation to deal or invest in the stock of another corporation without express authority for so doing; but that opposition has been entirely overcome, and it is now settled there, that one corporation may deal in the shares of another, without express authority so to do, unless where expressly prohibited, or the nature of its business render it improper so to deal. *Re Barned's Bank, L. R., 3 Ch., 105*; *Re Asiatic Banking Co., L. R., 4 Ch., 252*. In the latter of the cases just cited, Lord Justice SELWYN, in speaking of this power of corporations, said, "As to the capacity of a trading corporation to accept shares in another trading corporation, it is sufficient for me to say that I entirely agree with the judgment of Lord CAIRNS, in the case of *Barned's Banking Company*, viz., that there is not, either by the common or statute law, anything to prohibit one trading corporation from taking or accepting shares in another trading corporation. There may, of course, be circumstances which prohibit or render it improper for a company so to do, having regard to its own constitution, as defined by its memorandum and articles." It is in accordance with this statement, that the law is laid down as settled, by Brice, in his work on *Ultra Vires*, pp. 91, 92. And in this State, the same principle has been fully sanctioned in the case of *Elysville Manf. Co. v. Okisko Co., 1 Md. Ch. Dec., 392*, and same case affirmed on appeal, in *5 Md., 152*. Here, the stock that was purchased on account of the Steam Packet Company was transferred to the names of Robinson and Shoemaker, who held it as trustees for the benefit of the Steam Packet Company; and being thus qualified, they were legally eligible as directors in the Powhatan Company. The fact of their being directors of the Steam Packet Company in no way disqualified them from also being directors of the Powhatan Company. But if there have been as alleged illegality or impropriety in their acts and proceedings in the management of the affairs of the latter named company, such acts and proceedings are subject to different considerations.

[Remainder of opinion omitted.]

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SMITH, J., IN PEARSON v. CONCORD RAILROAD, NORTHERN RAILROAD, *et al.*

1883. 63 *New Hampshire*, 537, pp. 548-550.

SMITH, J.

The case finds that the Northern Railroad is the owner of 1290 shares of Concord Railroad stock, purchased in 1873, upon which it has since voted at the meetings of the Concord Railroad. A corporation cannot become a stockholder in another corporation unless such

*Rule*

power is given it by its charter or is necessarily implied in it (*Franklin Co. v. Bank*, 68 Me. 43; *Bank v. Agency Co.*, 24 Conn. 159, Green Bri. Ult. V. 91, and cases cited, *Mor. Corp.*, s. 229 and cases cited), especially if the purchase be for the purpose of controlling or affecting the management of the other corporation. *Sumner v. Marcy*, 3 W. & M. 105; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazelhurst v. Savannah &c. R. R. Co.*, 43 Ga. 13; *G. N. R'y Co. v. E. C. R'y Co.*, 21 L. J. Ch. 837; *Booth v. Robinson*, 55 Md. 419, 439. Dealing in stocks is not expressly prohibited in the act of congress providing for the organization of national banks (U. S. Rev. St., s. 5136, par. 7), but such prohibition is implied from the failure to grant the power. *Bank v. Bank*, 92 U. S. 122, 128. Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental or necessary to carry into effect the purposes for which they were established. *Downing v. Mt. W. Road Co.*, 40 N. H. 230, 232; *Trustees v. Peaslee*, 15 N. H. 317, 330; *Beaty v. Knowler's Lessee*, 4 Pet. 152; *Perrine v. Company*, 9 How. 172; *Bank v. Earle*, 13 Pet. 519; *Trustees Dartmouth College v. Woodward*, 4 Wheat. 518, 636.

Certain classes of corporations, such as religious and charitable corporations, and corporations for literary purposes, may rightfully invest their moneys in the stock of other corporations. The power, if not expressly mentioned in their charters, is necessarily implied, for the preservation of the funds with which such institutions are endowed, and to render their funds productive. So an insurance company or savings bank may rightfully invest its capital or deposits in the stocks of railroad companies, banks, manufacturing companies, and similar corporations. The power is necessary to enable them to engage in the business for which they are organized, and hence is implied, if not expressly granted, in their charters. Such investments are in the line of their business. On the other hand, a manufacturing or railroad corporation is incorporated to do the business of manufacturing, or transporting passengers and merchandise. Investing their funds in that of other corporations is not in the line of their business. Under extraordinary circumstances it may become necessary for a national bank, or a manufacturing corporation, or a railroad corporation, to acquire stock in another corporation, as in satisfaction of a valid debt, or by way of security, but with a view to its subsequent sale or conversion into money so as to make good or redeem an anticipated loss. *Bank v. Bank*, 92 U. S. 128; *Fleckner v. Bank*, 8 Wheat. 351.

In *Hodges v. N. E. Screw Co.*, 1 R. I. 312, the court said there was no doubt the defendant company might have taken the stock in the Iron Company in payment for its rolling-mill, if it had been taken with a view to sell again, and not permanently to hold it.

The Northern Railroad by its charter was vested with all the powers necessary to carry into effect the purposes and objects of its

Scripture  
examined

incorporation, subject to the laws in relation to corporations and railroads contained in the Revised Statutes. The objects of its incorporation are declared to be the accommodation of the public travel, and the transportation of goods and merchandise. Laws 1844. c. 190. It was not contemplated that more funds would be raised by the issue of stock than was necessary to construct and equip its road. The provision that when the net receipts shall amount to a sum making, with the prior net receipts of the corporation, more than an average of ten per cent. per annum from the commencement of its operations, the excess shall be paid into the treasury of the state, is evidence that the legislature never contemplated the accumulation of a fund from its earnings, or from loans, or from the issue of stock, to be invested in the stock of another railroad corporation. It can no more make a permanent investment of funds in the stock of another road than it can engage in a general banking, manufacturing, or steamboat business. It is neither incidental to the purposes of its incorporation, nor necessary in the exercise of the powers conferred by its charter. If it can purchase any portion of the capital stock of the Concord company, it may buy up the whole, and thus engage in a business for which its charter gives it no authority. And what would hinder a banking corporation from becoming a manufacturing company, or a manufacturing company from becoming a railroad common carrier?

But the facts in this case go further. The stock was bought at \$105 or \$106 per share (par value, \$50), a price largely in excess of its market value, and for the purpose of obtaining control of the Concord, and securing more favorable contracts to itself. In *Sumner v. Marcy*, 3 W. & M. 105, the corporation was chartered to deal in lumber, with a capital of \$150,000, of which only \$75,000 could be invested in personal property, and took stock in a bank to the value of \$168,000, for the purpose of getting control of the bank—a clear violation of its charter, but no more so than in this case. The purchase by a corporation of stock in another corporation will be enjoined at the instance of stockholders, when it involves a misapplication of corporate funds, or is a mere speculation, or is induced by a vicious purpose. *Pierce R. R.* 505. If the investment by one railroad corporation of more than \$135,000 in the stock of another at prices exceeding its market value, for the purpose of controlling such corporation for its own benefit, is not a misapplication of corporate funds, it would be difficult to find a case where such investment would be.

175 W. 2d 211

160 PAGE WOOD, V. C., IN JOINT STOCK DISCOUNT CO. v. BROWN.

1866. *Law Reports, 3 Equity Cases*, 139, pp. 150, 151.<sup>1</sup>

PAGE WOOD, V. C.

Then as regards the second branch of the argument, which is this: that assuming this not to be within the clause for making advances and investing in securities, the directors are to do "all such things as they shall consider incidental or conducive to the attainment of the above objects" — it appears to me to be much too wide a construction of that clause to say, that if the transaction in question is not within the scope of the original terms there stated, it can be brought within the scope of doing that which is considered to be incidental to the attainment of the objects, the objects being to use money, by making it available in the shape of a return of interest, or of discount. How do they justify it in this resolution? They say, if we take all these shares in the bank, it will increase our connections. What a prodigious extension I must give to those words in order to bring it within the power of the directors to do anything which they may consider conducive to the interests of the company by increasing its connections, however unconnected with the objects stated! I apprehend those powers must be exercised only for the purpose of doing something *bonâ fide* connected with the objects to be attained, and in the ordinary course of business adapted to their attainment. This was the only ground on which I proceeded in the case of *Taunton v. Royal Insurance Company*, 2 H. & M. 135. There I found that the transaction impeached was in the ordinary course of business, and in the way in which other people conducted their business. In that case, if a large amount of advertisement, or of expenditure of money, had been found necessary, it would have been laid out properly; but to carry the principle on to any remote extension of the objects, on the ground that if shares were bought in this bank there would be some control over the business of the discounting, would be, I apprehend, wholly unwarranted by the plainest rules of construction, which must limit the company's powers to those transactions which are naturally conducive to the objects specified. If the principle were thus extended, it would apply to the buying shares in every sort of

<sup>1</sup> The memorandum, relative to the incorporation of the Joint Stock Discount Company, states certain specific objects for which the company is established, including the discounting of bills and notes; and then adds: "and the doing of all such things as the directors shall consider incidental or conducive to the attainment of the above objects." The directors invested funds of the said company in the shares of a new banking company. The Vice-Chancellor held, that such an investment did not come within the objects specifically stated in the memorandum. He then discussed the question whether the investment could be upheld under the general clause above quoted. — ED.

undertaking — a brewery, for instance, or any other business where discounts might be of use. The company might become shipbuilders, or might be engaged in any other business; they might buy a share in any general merchant's business, because there would be bills in that business which would want discounting, and so they might get more business.

In this case the proceeding is simply an embarking in a totally different business; it is not the buying shares for the purpose of selling them again, or for investment, or anything of that kind, but it is buying shares for the purpose of enlarging the particular business which the company have to conduct. I think that it is clear that the bill must be answered, and the demurrer must be overruled, with costs.

no 7/629.42-44. The genl rule is undoubtedly that a corp cannot own corp stock unless expressly authz'd. -- In this it is a corp so forbidden to engage in any other bus than is expressly authz'd in its ch. or law & wh the org 2d Const Art 9. & to own stock in another corp is to become interested in, bus, such corp. A shh is engaged in bus. & corp w/ & measure, bus & is const. He has a voice in mgt - may exerce control such bus - is course liable for debts incurred while he is a shh. & The above prons makes all acts wh are wholly w/ & bus. & corp unlawful. -- &. The corp debt has no funds to invest. Its cap is for & purp. carry on its bus & no part of wh consists in getting out on & or making a profit in outside invest. Its sole purp was to earn a profit for its shh thru bus. (conducted by itself as specified in its articles. Its pub. was: it is & void.

cf R. D. to use Corp Funds in getting process '07 v Much L.R. 679.

Leg abt 24 Shaw. 51.

Poolg - 19 Yale 245-55 + cf 656-60.

Validity of Am L Rev. 663-71. VANDERBILT v. BENNETT.  
10 Col L.R. 658-60.

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## CHAPTER IV.

### THE VALIDITY OF VOTING TRUSTS.

#### VANDERBILT v. BENNETT.

1889. 6 Pa. County Court Reports, 193.<sup>1</sup>

**BILL IN EQUITY.** Exceptions to master's report, C. P. No. 1, Allegheny County.

The bill was filed by Cornelius Vanderbilt against Bennett *et als.*, to restrain defendant from exercising the voting power incident to 2,000 shares of stock in the Pittsburgh & Lake Erie R. R. Co., owned by plaintiff; and to restrain them from interfering with plaintiff in the exercise of his rights of ownership thereof. Defendant filed an answer. The cause was referred to C. S. Fetterman, Esq., as master, whose findings of fact were, in part, as follows:

October 20, 1877, an agreement in writing was entered into by various stockholders of the railroad company, including William H. Vanderbilt, who then owned 2,000 shares. By this agreement all the shares of the subscribers were to be registered in the names of trustees, and these trustees and their successors were to have perpetual power to vote upon the same; and were to vote with a view to carry out certain objects and policies defined in the agreement. Certificates were to be issued, and were issued, to Vanderbilt and other subscribers giving them all the rights of stockholders except the right to vote upon the stock, and reciting that the perpetual power of voting is vested in the trustees.

At the death of William H. Vanderbilt, in 1886, the 2,000 shares became vested in Cornelius Vanderbilt, whose right to vote upon the same was denied at the annual election in 1887.

No consideration passed between the subscribers to the trust agreement or between them and the trustees; and the defendants, who were the trustees at the time suit was brought, claimed no interest in the stock covered by the agreement, except the right to vote it.

The Act of Assembly of Pennsylvania, of February 19, 1849, to

<sup>1</sup> Statement abridged. — ED.



which the Pittsburgh & Lake Erie R. R. Co. was subject, provides, that at all general meetings or elections by the stockholders, each share of stock shall entitle the holder thereof to one vote; and that no proxy shall be received, unless the same shall have been executed within the three months preceding such election or general meeting.

The master's conclusions of law were:

1st. That the trust agreement is invalid as creating an unlawful combination and against public policy.

2d. That if the said agreement is such as can be legally sustained, it is simply a power of attorney or proxy, and revocable at the option of any party to it.

The master's opinion on the second point is, in part, as follows:

Ordinarily the authority of an agent is subordinate to that of his principal. Whether the agency be created by parol, or by writing under seal, unless it be coupled with an interest in the agent in the property, which would be detrimental to him should a revocation be attempted before the objects of the said letter of attorney or trust—whatever it may be—be accomplished, the agency is revocable at any time by the principal or by the death of the principal. We have in this case an agency created, and, as stated by the paper itself, a perpetual agency, in a certain body of men designated as trustees, for the purpose of voting and controlling the stock of the parties subscribing to the paper hereinbefore referred to, without any other or further duty to be performed in regard to the stock, excepting as specified in said paper. The trustees themselves have no interest whatever, financial or otherwise, in it, and no right to control the transfer or disposition thereof in any wise whatsoever. The trust raised by the said paper, if any, is simply and purely a dry trust, if we may so call it, leaving or giving no functions whatever for the trustees to perform, except the simple voting of the stock subscribed in said paper and in accordance with the vote they may cast to control the organization and policy of the said company. It is common sense and common law that the power or authority of the agent cannot be greater than that delegated to him by his principal.

[After quoting from *Griffith v. Jewett*, Superior Court of Cincinnati, 15 Weekly Law Bulletin, 119, and *Hafer v. Jewett*, 14 Weekly Law Bulletin, 68, the master proceeds:]

Every proxy, although by its terms irrevocable, is revocable unless coupled with an interest. Story on Agency, s. 476.

The principal may revoke the authority of his agent at his mere pleasure if the agent has no interest in its execution, and there is no valid consideration for it. It is treated as a mere nude pact and is deemed in law to be revocable upon the general principle that he alone who has an interest in the execution of an act is also entitled to control it. *Blackstone v. Buttermore*, 53 Pa. 266; *Hartley & Minor's Ap.*, 53 Pa. 212; also see *Walker v. Dennison*, 86 Illinois, 142; *McGregor v. Gardner*, 14 Iowa, 340; *Hunt v. Rousmanier*, 8 Wheaton, 201.

To constitute a power coupled with an interest, the interest must be in the subject-matter on which the power is to operate, and not in the mere results of its execution. *Hartley & Minor's Ap., supra.*

There is no consideration whatever between the trustees and the subscribers; none is claimed or mentioned in the agreement itself, and as between the subscribers themselves, there is also none. The mere fact that several or a majority have signed does not furnish a supporting consideration. 16 Ohio, 27; 41 Ohio, 527; 131 Mass. 528.

No one subscriber acquired under the agreement any interest in any other one stock or an undivided interest in the whole of the stock represented by the subscribers. No real and special consideration is claimed, and without this the agreement cannot be supported. An agreement of shareholders not to sell, pledge or give proxy for their shares, except by concurrent consent, is void without such consideration. *Fisher v. Bush*, 35 Hun (N. Y.), 641.

The entire beneficial interest in the stock is severally vested in the subscriber, the voting power in the trustees, and does not differ materially from what it would be if the stockholders retaining their shares had simply united in a proxy authorizing the trustees to cast the vote of all of them. *Griffith v. Jewett, supra.*

The master is, therefore, of opinion, that said paper called a deed of trust, if valid, is in effect nothing more than a power of attorney, or proxy, given for the purpose of carrying out the designs of the parties therein mentioned, and as such, revocable at the pleasure of any party to it. And under all the facts of the case the complainant is entitled to relief, and [the master] would recommend a decree therefor as prayed for in the said bill of complaint.

To this report the defendants excepted.

*George Shiras, Jr., Jarvis M. Adams, and Stevenson Butler*, for the exceptions.

*John Dalzell, and Knox & Reed, contra.*

STOWE, P. J. The questions involved in this controversy are of the gravest character, and should have had a more deliberate and careful consideration, both by the master and the court, than either have had time to bestow upon it. The former has had four or five days to prepare his report, and the latter one day to consider the exceptions. It is hoped that this will be sufficient apology for any short-comings in the one and the want of an extended opinion by the other sustaining the views entertained by the court in this matter. We think that the trust agreement in question is absolutely void as contrary to public policy, and because it substantially amounts to a repeal of our Act of Assembly in regard to the right to vote incident to the ownership of railroad stock. But whether this be so or not, which, as the case stands, is not judicially before us for our determination, we are of the opinion that it is at least revocable by the plaintiff, and has been duly revoked so far as his stock is concerned, and, therefore, the exceptions to the master's report are now overruled, and decree in accordance herewith *pro ut*.

But we are also of opinion that under the circumstances of this case the plaintiff should pay the costs of this proceeding.

NOTE. An appeal to the Supreme Court from the decree entered in accordance with this opinion was *non prossed* at October Term, 1888, it being understood that the parties had agreed upon a settlement.

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ROBINSON, J., IN SHEPAUG VOTING TRUST CASES.

1890. 60 Conn. (Supplement), 553, pp. 578-581.

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It seems to the court that the surrender by a stockholder of his power and right to vote on his stock for the term of five years is contrary to the policy of the law of this state. Were this a power of attorney in formal terms, no claim would be made but that it was not only contrary to the policy of the law of this state, but in direct conflict with our statute, which says that "no person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting; and no such power shall be used at more than one annual meeting of such corporation." Gen. Statutes, § 1927. This statute tends to disclose what the policy of the law of this state is, touching the matter of the surrender by a stockholder of his voting power to some one else. It would seem that it is opposed to such surrender for an indefinite period or for a period of five years. Evidently it was thought a longer surrender of the voting power would result disastrously in many ways.

It cannot be denied that as much disaster might follow to the business and the finances of a corporation and the interest of stockholders, where the voting power is yielded up in a five years voting trust, as by a five years power of attorney. The difference between an irrevocable power and a power irrevocable for five years, is a difference in degree and not in principle. A five year voting power, irrevocable for that time, would furnish time enough and opportunity enough to realize all the evils which our one year statute is manifestly intended to guard against.

It is the policy of our law that an untrammelled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates, is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs; saving to himself simply the title, the right to

dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and the management of the corporation, and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will, in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation.

And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow-stockholder, to so use such power and means as the law and his ownership of stock give him, that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud, and the seeking of individual gains at the sacrifice of the general welfare, as is possible. This I take it is the duty that one stockholder in a corporation owes to his fellow-stockholder; and he cannot be allowed to disburden himself of it in this way. He may shirk it perhaps by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in a fiduciary relation to his fellow-stockholders. For these reasons I hold that this trust agreement is void as against the policy of the law of this state.

And why is not the voting power surrendered in this trust agreement the equivalent of a power of attorney, and why has not the right of this Trust Company and this committee to control and cast the vote upon this stock, if at any time they had any legal right to exercise it, ceased to exist? It is now more than one year since the voting power was executed, and that power has been used already at one annual meeting. Why is not this voting power in this trust agreement, and the attempt of this trustee and this committee to exercise it now, a disobedience of our one year statute above quoted?

It is claimed that it is not a power of attorney because the Trust Company holds the legal title to the stock. It is said that the right to vote on the stock is not dissociated from the legal title to the stock in this instance. But does this reply quite answer the objections created by the facts in the case, and is it quite true that the voting power here is not dissociated from the legal title? An examination of the trust agreement discloses that the Trust Company is a mere agent, with no beneficial interest in the stock. It holds the title, but the real owner is somebody else. The Trust Company is simply the hand to cast such

ballot as this committee directs. The committee is also but an agent, but without the legal title to the stock or any title to it. It is the head, and the Trust Company is the hand; simply that. The committee direct, control, and select what vote shall be cast, and are the agents and attorneys to perform this very essential part of the act of voting.

The trust company is one of the parties to the trust agreement, and it holds the legal title to the stock, and as such holder of the legal title it has in this trust agreement surrendered all a voter's power except the mere manual act of casting the selected ballot. It has in this trust agreement in effect surrendered to this committee the power to select the ballot. It has conceded to this committee the power to demand that it shall vote as they direct. What remains then in this trustee of the voting power, beyond being the mere hand, the use of which this committee is given the right to demand for this purpose at any stockholders' meeting? Is not the full voting power to all intents and purposes in this committee, and is it not so by delegation? It seems to me that the voting power in this trust agreement falls within the spirit and intent of the prohibition of our statute heretofore referred to, and is terminated by lapse of time and the use of it already at one annual meeting.

It is insisted that there is nothing illegal, *per se*, in the pooling of stock to carry out a scheme of extension authorized by law and favored by the corporation. This may be true under proper limitations, and when this is all there is to the scheme; but when underlying that pooling contract there is between the members of the syndicate, who are directors or a majority of the directors of the corporation, a secret agreement which enters into this pooling contract, and forms the object of its creation, and by which they are to take to themselves the profits arising from such extension, or from the contracts which they as directors make, elements of unfairness and opportunity for fraudulent and dishonest practices are introduced, which the court cannot too severely condemn. Such a pooling contract or voting trust is in violation of the most elementary principles of law governing the dealings of trustees with trust property and their *cestuis que trust*.

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## MOBILE AND OHIO R. R. CO. v. NICHOLAS.

1893. 98 *Alabama*, 92.<sup>1</sup>

APPEAL from Mobile Chancery Court.

Bill in equity by stockholder in Mobile & Ohio R. R. Co. against the railroad company, the Farmers' Loan & Trust Co., *et al.*

In 1876, the railroad company was in the hands of a receiver; decrees of foreclosure had been rendered in suits on mortgages; and its total indebtedness largely exceeded the value of the entire railroad property. An arrangement was made between the creditors and the company whereby the creditors accepted debentures in lieu of their original evidences of debt; and the great majority of the stockholders, in effect, conferred upon a trustee irrevocable power to vote upon the shares so long as any of the debentures should be outstanding. The shareholders assigned their stock to the committee of reorganization; the committee gave the Farmers' Loan & Trust Company an irrevocable power of attorney to vote upon the stock so long as any of the debentures should be outstanding. The shareholders who had thus assigned their stock to the committee received in exchange new certificates entitling them to all the rights and privileges which pertain to the ownership of the said shares, saving and excepting that such ownership is subject to the power heretofore granted by the owners of said shares to the Farmers' Loan & Trust Company, in trust for the security of the debentures, to vote upon said shares.

Under the foregoing adjustment, all the creditors, except those secured by newly issued first mortgage bonds, accepted the debentures provided for, in lieu of their former evidence of debt; the foreclosure decrees were assigned to the Farmers' Trust Company; the receiver, under the orders of the court, turned the property over to the railroad company; and the corporation resumed its control and management of its property and business.

In 1892, the plaintiffs denied the authority of the Trust Company, under the power of attorney held by it to vote their stock, and claimed for themselves the right to vote their own stock. The right of plaintiffs to vote at the stockholders' meeting was denied. Thereupon plaintiffs filed the present bill; praying, among other things, that the Farmers' Loan & Trust Company be enjoined from voting on the stock under the power of attorney; and that the railroad company be enjoined from refusing to accept the votes of plaintiffs and of other stockholders.

A preliminary injunction was granted. The defendants moved to dismiss the bill for want of equity, and to dissolve the injunction. The Chancellor overruled the motions. From his decrees an appeal was taken.

<sup>1</sup> Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — Ed.

*E. J. Phelps*, and *Fred. W. Whitridge*, for railroad company, appellants.

*E. L. Russell*, and *R. P. Deshon*, for appellants.

*Hannis Taylor*, for Farmers' Loan & Trust Co., appellants.

*H. C. Tompkins*, *Gaylord B. Clark*, *William J. Curtis*, and *Alfred Jaretski*, for appellees.

COLEMAN, J. [After stating the case.] The facts stated in the bill show, that by the reorganization and compromise of 1876, perfected in 1879, the voting power was severed from the stockholder, and until the payment of the debentures, irrevocably vested in the Farmers' Trust Company and the debenture holders. It is contended for complainants that the agreement was, and "is void *per se*," because 1st: "It contravenes the language of the charter of the railroad company; and 2d, because it is against public policy."

The charter expressly provides, "Each share shall entitle the holder thereof to one vote, which vote may be given by said stockholder in person, or by lawful proxy."

So far, then, as the right to vote by proxy is questioned, the charter expressly grants the power, and the legislature has thus declared that it is not unlawful, *per se*, to separate the voting power from the stockholder, so far as the appointment of a proxy may be considered a severance of the voting power. Where a proxy is duly constituted, and the power of the appointment is without limitation, a vote cast by the proxy binds the stockholder, whether exercised in behalf of his interest or not, to the same extent as if the vote had been cast by the stockholder in person. We do not hold that a power of attorney, absolute in its terms, will authorize the agent or proxy, to effect contracts, or legalize acts, outside of the scope of his authority, or contrary to law or public policy, neither could the stockholder in person by his vote effectuate such a result. The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground, that there has been a separation of the voting power from the stockholders, but because of the unlawful purpose for which the proxy was appointed, or the unlawful end, attempted to be effected by the exercise of the voting power. The distinction should be kept in view. Take the case of the *Richmond & Danville Extension Company v. The Woodstock Iron Co.*, 129 U. S. 643, cited by complainant. The Woodstock Iron Co. agreed to pay thirty thousand dollars, if the Georgia Pacific Railroad was run through the town of Anniston, where the Woodstock Iron Co. owned a large plant, mines, and other property. The contract was held void as being against public policy. No question of the separation of the voting power from the shareholder, arose in the case. It was the character of the contract, the unlawful purpose in view, to build up the Woodstock Iron Co. at the expense of the stockholders of the railroad company that was condemned. The same principle applies to many other cases cited in which, it was held, "that contracts made to influence railroad companies in selecting their routes and erecting their

depots and stations by donations in land and money to some of its directors and stockholders were invalid," citing *Bestor v. Wathen*, 60 Ill. 131; *Linden v. Carpenter*, 62 Ill. 307.

Take the case of *Hafer v. N. Y., Lake Erie & Western R. R. Co.*, 14 Weekly Law Bulletin, p. 68. The case is thus stated: "A controlling interest in the stock of the Cincinnati, Hamilton, and Dayton Railroad Company was bought up in 1882, and placed in the name of H. I. Jewett, who was Vice-President of the New York, Lake Erie, and Western Railway Co., under the agreement that he should give irrevocable proxy to such persons as the Erie should appoint to vote on the stock; that his stock certificates should be left in the hands of trustees, and that they should issue to the respective owners of the stock trust, or pool certificates for amounts equal to their respective equitable interest. On all stock thus pooled, the Erie agreed to guarantee a certain dividend."

The court declared the contract void "both on the ground that the power is denied to one corporation thus to acquire control of another, and that the stockholder can not barter away the right to vote upon his stock." True the opinion declares as an independent proposition, "that the stockholder can not barter away the right to vote upon his stock," and yet it is shown, by the facts of the case and the opinion, that the purpose to be effected by the barter of the right to vote, to wit, the placing "of an Ohio corporation into the hands of a New York corporation," the enabling "one corporation to acquire control over another" was illegal. Speaking of the facts of the case the opinion proceeds as follows: "It is obvious that the rule as to executed contracts can not be applied to the plaintiff for any such reason as that last mentioned, *for he was not a party to the contract*. There are other cases wherein special circumstances made it imperative, as a matter of good faith, that the contract should not be interfered with, and others, when the protection of interest acquired by innocent parties caused the court to refrain." There is no rule of law which requires contracts to be upheld which are void as against public policy, in order to preserve "good faith" or "innocent parties." The rule of estoppel is often applied to prevent undue advantage by one person over another, but the rule does not extend to contracts which are void because contravening public policy. Considering the opinion as an entirety, we do not regard it as authority to the proposition, that an agreement which provides for a separation of the right to vote from the holder of the stock is "*per se*," at all times and under all circumstances contrary to public policy and void. We have examined case after case and find generally that the agreements declared void by the courts, where the power to vote was separated from the stockholder and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful, such as the courts would not sanction if the principal had voted and not a proxy; and in cases of a mere dry trust, it is held that the stockholder might revoke a power of attorney in form irrevocable. The doctrine as to dry trust does not arise in this case.



Certainly the case of *Griffith v. Jewett*, 15 Weekly Law Bulletin, 419, or of *Moses v. Scott*, 84 Ala. 608, do not sustain complainants' contention in this respect. If there were no precedents, upon principle, we would hold that in determining the validity of an agreement, which provides for the vesting of the voting power in a person other than the stockholder, regard should be had to the condition of the parties, the purpose to be accomplished, the consideration of the undertaking, interests which have been surrendered, rights acquired, and the consequences to result. The law does not make contracts for parties, neither will it annul them except to preserve its own majesty, and to conserve the greater interest of the public. Let us examine the conditions of the parties, the purpose in view and effect of the agreement of 1876, consummated in 1879, the consideration and interest surrendered and rights acquired by the readjustment, and issue of the debentures, the position of the complainants thereto, and the results of holding that reorganization, *per se*, void.

The complainants belong to the class known as "Assenting Stockholders." They surrendered their stock to the committee of reorganization in order that the power of attorney, executed to the trust company by the committee of reorganization, might be executed, and that the debentures should be issued to the creditors of the railroad corporation. The certificates of stock held by them show, upon their face, that they are subject to the power of attorney and to the rights of the debenture-holders. At the time the plan of adjustment was agreed upon the railroad company was in the hands of a receiver. Decrees of foreclosure rendered against the company. The indebtedness far exceeded the value of the railroad company's property. The execution of the decrees of foreclosure, by a sale of the property, and the prosecutions of the admitted claims against the railroad company, would necessarily have transferred the property to other parties and wiped out every vestige of present available interest or right of the stockholder, or hope of future profit. The creditors held the vantage ground, and in law their rights and interest were paramount to the stockholders. The latter might accept propositions but were in no position to dictate terms. These were the circumstances under which the settlement and agreement was made. Stated in short, the compromise and settlement led to the issue of the debentures to the creditors in lieu of their original evidences of debt, and a mortgage upon certain property to secure them, a plan for a sinking fund for their benefit, and the right and privilege under an irrevocable power of attorney to vote the stock *until the debentures were paid*. The power of attorney was not in perpetuity, or absolute, but only until the debentures were paid, and a fair construction under the circumstances required that the voting power should be used fairly and honestly to this end, or as stated in the agreement itself, "for the uses and purposes declared in said memorandum, and until the same are fully accomplished." In consideration therefor the decrees of foreclosure, at first suspended, were transferred to the trust



into a pooling contract whereby all the syndicate stock "shall be voted at each annual meeting for a period of not less than three years, for such board of directors as shall be named" by a committee of five of the subscribers, with power to a majority of them to fill any vacancy in the committee. It is said that this agreement was illegal, and that the covenant sued upon was so directly aimed at helping to bring the unlawful arrangement about that it must fall with the other. *Barnes v. Smith*, 159 Mass. 344, 347; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396.

Without deciding whether, if the covenant was dependent upon the rendering of further services, it was so closely connected with the syndicate agreement as to fall if the latter cannot be sustained, we pass to the question whether the latter agreement is unlawful on its face, bearing in mind that unless it is unlawful on its face it has the advantage of a finding in favor of the plaintiff. In dealing with this question it does not need to be said that combination of common interests is necessary, and constantly is taking place. It is as legitimate for a majority of stockholders to combine as for other people. The fact that they expect "gain and advantage"—in the words of the syndicate agreement—to accrue to them, does not make the combination unlawful. That expectation and intent would have that effect only if the gain was to be at the expense of the corporation, or in some way was intended to work a wrong to the other stockholders. No such intent appears, and although it is impossible not to view such an arrangement with suspicion, it is also impossible to let suspicion take the place of proof.

The only serious ground of objection is the agreement that the stock "shall be voted at each annual meeting" for three years, for a board of directors named by the committee. It is suggested that this was an unlawful attempt by the contracting parties to deprive themselves in advance of their deliberative power and duty as stockholders, and to submit themselves to the dictation of five men who in the future might not be even members of the corporation. Perhaps the notion upon which these suggestions are founded has been pressed somewhat further than would be warranted by more far-seeing views, but we have no occasion to discuss it in this broad form. The question before us is not whether it would be possible to carry out the contract in a way which would have made the contract bad if specified in it, but whether it was impossible to carry out the contract in a way which might lawfully have been specified in advance. We put the question in this form because there is no doubt that the subscribers might actually have done the things stipulated without giving any one a right to complain. That is to say, they might have held their stock and voted by previous understanding according to the advice of the committee, as long as they chose. The question is what they might contract to do; for this is supposed to be a case where a contract to do lawful acts is unlawful.

The syndicate agreement does not specify how it is to be carried out. It contemplates the making of another contract. As the later contract is to be a pooling contract, it was possible, if not probable, that one element of the arrangement would be that the title to the stock should be given to a trustee, and this happened in fact. During the three years the stock seems to have been held by a bank. The stock was transferred to it, and was not transferred to the members of the syndicate. But it would have been possible, consistently with the terms of the syndicate agreement, that the committee who were to name the board of directors themselves should be the trustees. In that case the trustees, of course, would have voted on the stock. They, not their *cestuis que trust*, would have been the stockholders for the time being. We know nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote upon it. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525, 527. See *Greene v. Nash*, 85 Maine, 148.

Supposing that the committee had been trustees, what would the syndicate agreement have amounted to then? Merely an agreement by each of the trustees to vote as they should jointly agree to vote, and an agreement by the subscribers not to demand back their shares for three years. The latter term certainly is not illegal, whether valid or not. A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one he cannot terminate it at will, and the attempt to cut himself off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff. See *Williams v. Montgomery*, 148 N. Y. 519, 525. It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other States show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together. *Faulds v. Yates*, 57 Ill. 416; *Smith v. San Francisco & North Pacific Railway*, 115 Cal. 584; *Havemeyer v. Havemeyer*, 11 Jones and Spen. 506, 512, 513. Affirmed, according to Beach, Corporations, § 304, n. 6, and *Fisher v. Bush*, 35 Hun, 641, in 86 N. Y. 618. See *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525, 527.

We have considered such decisions elsewhere as have been called to our attention or found by us. Few of them are by courts of final resort. Nothing that we have found in them satisfies us that the judge below was not warranted in finding for the plaintiff.

*Judgment for the plaintiff.*

**APPENDIX**  
**OF**  
**CORPORATE FORMS.**

**CERTIFICATE OF INCORPORATION**  
**OF**  
**CONSOLIDATED STEEL COMPANY.**

STATE OF NEW JERSEY, ss.:

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the Act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)" and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

First: The name of the corporation is "Consolidated Steel Company."

Second: The location of its principal and registered office in the State is at No. 10 Day Street, in the City of Hoboken, County of Hudson.

The name of the agent therein and in charge thereof and upon whom process against the corporation may be served is the Security Trust Company.

Third: The objects for which the corporation is formed are:

To manufacture iron, steel, manganese, coke, copper, lumber and other materials, and all or any articles consisting, or partly consisting, of iron, steel, copper, wood or other materials, and all or any products thereof.

To acquire, own, lease, occupy, use or develop any lands containing coal or iron, manganese, stone or other ores, or oil, and any wood lands or other lands for any purpose of the company.

To mine or otherwise to extract or remove coal, ores, stone and other minerals and timber from any lands owned, acquired, leased or occupied by the company, or from any other lands.

To buy and sell, or otherwise to deal or to traffic in iron, steel, manganese, copper, stone, ores, coal, coke, wood, lumber and other materials, and any of the products thereof and any articles consisting or partly consisting thereof.

To construct bridges, buildings, machinery, ships, boats, engines, cars and other equipment, railroads, docks, slips, elevators, water works, gas works and electric works, viaducts, aqueducts, canals and

other water-ways, and any other means of transportation, and to sell the same, or otherwise to dispose thereof, or to maintain and operate the same, except that the company shall not maintain or operate any railroad or canal in the State of New Jersey.

To apply for, obtain, register, purchase, lease or otherwise to acquire, and to hold, use, own, operate and introduce, and to sell, assign or otherwise to dispose of, any trade-marks, trade-names, patents, inventions, improvements and processes used in connection with or secured under letters patent of the United States, or elsewhere or otherwise, and to use, exercise, develop, grant licenses in respect of, or otherwise to turn to account, any such trade-marks, patents, licenses, processes, and the like, or any such property or rights.

To engage in any other manufacturing, mining, construction or transportation business of any kind or character whatsoever, and to that end to acquire, hold, own and dispose of any and all property, assets, stocks, bonds and rights of any and every kind, but not to engage in any business hereunder which shall require the exercise of the right of eminent domain within the State of New Jersey.

To acquire by purchase, subscription or otherwise, and to hold or to dispose of, stocks, bonds, or any other obligations of any corporation formed for, or then or theretofore engaged in or pursuing, any one or more of the kinds of business, purposes, objects or operations above indicated, or owning or holding any property of any kind herein mentioned, or of any corporation owning or holding the stocks or the obligations of any such corporations.

To hold for investment, or otherwise to use, sell or dispose of, any stock, bonds or other obligations of any such other corporation; to aid in any manner any corporation whose stock, bonds or other obligations are held or in any manner guaranteed by the company, and to do any other acts or things for the preservation, protection, improvement or enhancement of the value of any such stock, bonds or other obligations, or to do any acts or things designed for any such purpose; and, while owner of any such stock, bonds or other obligations, to exercise all the rights, powers and privileges of ownership thereof, and to exercise any and all voting power thereon.

The business or purpose of the company is from time to time to do any one or more of the acts and things herein set forth; and it may conduct its business in other states, and in the territories, and in foreign countries, and may have one office, or more than one office, and keep the books of the company outside of the State of New Jersey, except as otherwise may be provided by law; and may hold, purchase, mortgage and convey real and personal property, either in or out of the State of New Jersey.

Without in any particular limiting any of the objects and powers of the corporation, it is hereby expressly declared and provided that the corporation shall have power to issue bonds and other obligations in payment for property purchased or acquired by it, or for any other

object in or about its business; to mortgage or pledge any stocks, bonds or other obligations, or any property which may be acquired by it, to secure any bonds or other obligations by it issued or incurred; to guarantee any dividends, or bonds, or contracts, or other obligations; to make and perform contracts of any kind and description, and, in carrying on its business or for the purpose of attaining or furthering any of its objects, to do any and all other acts and things, and to exercise any and all other powers which a copartnership or natural person could do and exercise, and which now or hereafter may be authorized by law.

Fourth: The total authorized capital stock of this corporation is five hundred thousand dollars, divided into five thousand shares of the par value of one hundred dollars each. Of said stock two thousand shares are to be preferred stock, and three thousand shares are to be common stock.

The holders of such preferred stock shall be entitled to receive from the surplus or net profits arising from the business of the corporation a fixed yearly dividend of seven per centum, payable semi-annually on the 2d days of January and July in each year, before any dividend shall be set apart or paid on the said common stock.

Should the surplus or net profits arising from the business of the corporation, prior to any dividend day, be insufficient to pay the dividend upon the preferred stock, such dividend shall be payable from future profits, and no dividend shall at any time be paid upon the said common stock until the full amount of seven per centum per annum up to that time upon all the preferred stock shall have been paid or set apart. The holders of preferred stock shall be entitled to no dividends beyond the seven per centum aforesaid.

The holders of such preferred stock shall, in case of the liquidation or dissolution of the company, be entitled to be paid in full both the principal of their shares and accrued dividends before any amount shall be paid to the holders of the common stock.

Fifth: The names and post-office addresses of the incorporators and the number of shares subscribed for by each, the aggregate of such subscriptions being the amount of capital stock with which the company will commence business, are as follows:

NAME.	POST-OFFICE ADDRESS.	NUMBER OF SHARES (COMMON STOCK).
John Adams,	10 Day Street, Hoboken, N. J.	10
James Brown,	"	10
Charles Clark,	"	10

Sixth: The duration of the company shall be perpetual.

Seventh: The number of directors of the company shall be fixed from time to time by the by-laws; but the number, if fixed at more than three, shall be some multiple of three. The directors shall be

classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class for a term of two years; and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose term shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

Unless authorized by votes given in person or by proxy by stockholders holding at least two-thirds of the capital stock of the corporation, which is represented and voted upon in person or by proxy at a meeting specially called for that purpose, or at an annual meeting, the board of directors shall not mortgage or pledge any of its real property, or any shares of the capital stock of any other corporation; but this prohibition shall not be construed to apply to the execution of any purchase-money mortgage or any other purchase-money lien.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the fifth day of April, A.D. 1909.

JOHN ADAMS	[SEAL]
JAMES BROWN	[SEAL]
CHARLES CLARK	[SEAL]

Signed, sealed and delivered  
in the presence of

JACOB AUSTIN.

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON. } ss.:

Be it remembered that on this fifth day of April, A.D. 1909, before the undersigned personally appeared John Adams, James Brown and Charles Clark, who I am satisfied are the persons named in and who executed the foregoing certificate, and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

JACOB AUSTIN,  
Master in Chancery of New Jersey.

{ Seal of the  
Master in Chancery. }



**BY-LAWS**  
**OF**  
**CONSOLIDATED STEEL COMPANY.**

**. ARTICLE I.**

**STOCKHOLDERS.**

**1. Annual Meeting.** A meeting of the stockholders shall be held annually at the principal office of the company in New Jersey at ten o'clock in the forenoon on the second Monday in June, for the purpose of electing directors, and for the transaction of any other business authorized or required to be transacted by the stockholders. In case such second Monday shall be a legal holiday, the meeting shall be held on the next succeeding day which is not a legal holiday.

Notice of the annual meeting shall be mailed at least ten days prior to the meeting to each stockholder at the address last furnished by him to the company, provided he shall have furnished such address.

**2. Special Meeting.** Special meetings of the stockholders shall be held at the principal office of the company in New Jersey.

The board of directors may at any time call a special meeting of the stockholders, and it shall call the same whenever the holders of not less than one quarter of the stock of the company outstanding shall in writing make application therefor to the president, stating the object or objects of such meeting.

Notice of such special meeting and of the object or objects thereof shall be mailed to each stockholder in like manner as notice of an annual meeting.

**3. Quorum.** The holders of one-third of all the shares of the capital stock of the company outstanding shall constitute a quorum at any meeting for all purposes, including the election of directors; but the holders of a majority of the stock represented at any meeting may, at the end of one hour from the time for which the meeting was called, adjourn the meeting from time to time without further notice, and at any such adjourned meeting at which a quorum shall attend all business may be transacted which might have been transacted at the meeting as originally called.

**4. Organization.** The president, or in his absence a vice-president, shall call meetings of stockholders to order, and act as chairman

thereof. In case neither the president nor any vice-president is present, any stockholder present may call the meeting to order, and the stockholders present may then elect a chairman of such meeting.

The secretary of the company shall act as secretary at all meetings of the stockholders. In his absence, the chairman may appoint any person to act as secretary.

**5. Voting.** At any annual or special meeting each stockholder shall have one vote for each share of stock standing in his name on the books of the company at the time of the closing of the transfer books for said meeting.

Every stockholder shall be entitled to vote in person, or by proxy appointed by an instrument in writing, signed by such stockholder or by his duly authorized agent, and delivered to such person or persons as the chairman of the meeting may direct. A stockholder shall be deemed to be present whether present in person or represented by proxy.

Voting for directors shall be by ballot, and upon the demand of any stockholder present the voting upon any question shall be by ballot.

**6. Inspectors.** Whenever the vote of the stockholders shall be taken by ballot, the chairman of the meeting shall appoint two persons to be inspectors. The inspectors shall be sworn to the faithful performance of their duties; they shall open and close the polls; they shall decide all questions as to the validity of proxies and the qualification of voters; and they shall, in writing, certify to the results.

## ARTICLE II.

### BOARD OF DIRECTORS.

**1. Number.** The board of directors shall consist of fifteen members.

**2. Term of Office.** At the first election of directors, five directors shall be elected to hold office until the first annual meeting thereafter; five to hold office until the second annual meeting thereafter, and five to hold office until the third annual meeting thereafter. At each annual meeting, the successors to the directors whose term shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of five directors shall expire in each year. A majority of votes cast shall be necessary to elect.

Each director shall serve for the term for which he shall have been elected, and until his successor shall have been duly elected and qualified.

**3. Vacancies.** In case of any vacancy in any class of directors, through death, resignation, disqualification or other cause, the remaining directors, by affirmative vote of a majority of their number, whether

constituting a quorum or not, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until his successor shall have been duly elected and qualified.

**4. Meetings.** The board of directors may hold its meetings and have one or more offices and keep the books of the company, except the stock and transfer books, at such place or places in the State of New Jersey or outside of the State of New Jersey as it may from time to time determine.

Stated meetings shall be held on the first Wednesday of each month at 12 o'clock noon. If such day is a legal holiday, the meeting shall be held on the next succeeding day which is not a legal holiday. No notice shall be required for any stated meeting.

Special meetings may be called by the president or any three directors. Each director shall furnish to the secretary an address to which notices of special meetings may be sent. Notice of the time and place of each special meeting shall be sent to each director who has furnished such address, and such notice shall be sent, if by mail, at least two days, or, if by telegram, at least six hours, prior to the meeting.

A majority of the directors in office shall constitute a quorum. A majority of those present at the time and place of any stated or special meeting, although less than a quorum, may adjourn the meeting from time to time, without notice.

**5. Powers.** The board of directors shall have the management of the business of the company. The board may exercise all such powers of the company and do all such lawful acts and things as are not by statute, or by the certificate of the company, or by these by-laws directed or required to be exercised or done by the stockholders.

**6. Compensation.** Each director shall receive \$10 for attendance at any meeting of the board.

**7. Executive Committee.** The directors shall elect from their number an executive committee, to consist of six members, and shall designate one of such six members to be the chairman of the committee. The members of the committee and the chairman thereof shall serve during the pleasure of the board.

During the intervals between the meetings of the board of directors the executive committee shall possess and may exercise all the powers of the board of directors in such manner as the executive committee shall deem best for the interests of the company in all cases in which specific directions shall not have been given by the board of directors. All action by the executive committee shall be reported to the board of directors at its meeting next succeeding such action, and shall be subject to revision or alteration by the board of directors; provided that no rights or acts of third parties shall be affected by any such revision or alteration.

The executive committee may hold its meetings at such times and places as it may determine.

In every case the affirmative vote of a majority of all the members of the committee shall be necessary to the adoption of any resolution.

The compensation of members of the executive committee shall be fixed by the board of directors.

### ARTICLE III.

#### OFFICERS.

**1. Election or Appointment.** The board of directors shall elect from their number a president, and shall appoint a treasurer and a secretary. The board may also appoint one or more vice-presidents, one or more assistant treasurers, one or more assistant secretaries, and such other officers as it may deem advisable.

The same person may be treasurer and an assistant secretary, or secretary and an assistant treasurer, or an assistant treasurer and an assistant secretary.

**2. Term of Office and Compensation.** The officers so elected or appointed shall hold office during the pleasure of the board, and their compensation shall be fixed by the board.

**3. Duties of Officers.** The president shall preside at meetings of the stockholders and of the board of directors. He shall be the chief executive officer of the company and shall have general charge of the business of the company, subject to the executive committee and the board.

The treasurer shall give such bond for the faithful discharge of his duties as the board may require. He shall have custody of all the funds and securities of the company which may have come into his hands, and shall keep full and accurate accounts of all moneys received and paid by him on account of the company.

The secretary shall keep the minutes of all meetings of the stockholders and of the board, and of the executive committee; he shall attend to the giving and serving of all notices; and he shall have the custody of the seal of the company.

The president, treasurer, and secretary shall, in general, perform the duties incident to their offices, and any other duties designated by the board. All other officers shall perform such duties as may be designated by the board.

**4. Execution of Instruments on behalf of the Company.** All certificates for shares of the capital stock of the company, all bills of exchange, promissory notes and checks issued, drawn, or made by the company shall be signed by the president or a vice-president, and by the treasurer or an assistant treasurer. All other contracts or obligations of the company shall be executed by such officer or officers as the board may direct. The seal of the company shall be affixed to such

instruments as the board may direct, and, when so affixed, shall be attested by a secretary or an assistant secretary, if the board shall so direct.

## ARTICLE IV.

### CAPITAL STOCK. DIVIDENDS. SEAL.

**1. Certificates of Shares.** The certificates for shares of the capital stock shall be in such form, not inconsistent with the certificate of incorporation, as shall be approved by the board of directors.

No certificate shall be valid unless it is sealed with the corporate seal of the company, and signed by the president, or a vice-president, and the treasurer, or an assistant treasurer, and such other persons as the board may determine.

All certificates shall be consecutively numbered. The name of the person owning the shares represented thereby, with the number of such shares and the date of issue, shall be on the company's books.

**2. Transfer of Shares.** Shares of the capital stock of the company shall be transferred only on the books of the company by the holder thereof in person, or by his attorney, upon surrender and cancellation of certificates for a like number of shares, or (in case of lost or destroyed certificates) upon the receipt of a bond satisfactory to the board.

The board of directors shall have power to make all such rules and regulations as they may deem expedient concerning the issue, transfer, and registration of certificates for shares of the capital stock of the company; and to appoint a transfer agent and a registrar of transfers, and to require all stock certificates to bear the signature of such transfer agent and of such registrar of transfers.

The stock transfer books shall be closed for the meetings of stockholders and for the payment of dividends during such periods as may be fixed by the board, and during such periods no stock shall be transferable.

**3. Dividends.** The board of directors in its discretion may from time to time declare dividends upon the capital stock from the surplus or net profits of the company, subject to the provisions of the certificate of incorporation.

**4. Working Capital.** The board of directors may fix a sum which may be set aside or reserved, over and above the company's capital stock paid in, as a working capital for the company, and from time to time the board may increase, diminish, and vary the same in its absolute judgment and discretion.

**5. Corporate Seal.** The board of directors shall provide a suitable seal containing the name of the company, which shall be in the custody of the secretary.

ARTICLE V.

AMENDMENTS.

These by-laws may be altered or amended by the stockholders at any regular or special meeting, or by the directors at any regular or special meeting, provided not less than eight directors shall vote in favor of such alteration or amendment.

**MINUTES OF FIRST MEETING OF INCORPORATORS**  
**OF**  
**CONSOLIDATED STEEL COMPANY.**

The first meeting of the incorporators of Consolidated Steel Company was held at Number 10 Day Street, Hoboken, New Jersey, designated in the certificate of incorporation as the location of the principal and registered office of the company, on the sixth day of April, 1909, at ten o'clock in the forenoon, pursuant to a written waiver of notice signed by all the incorporators, fixing the time and place aforesaid.

The following incorporator was present in person :

NAME.	NUMBER OF SHARES.
John Adams,	10.

The following incorporators were represented by proxy :

NAME.	NAME OF PROXY.	NUMBER OF SHARES.
James Brown,	John Adams,	10.
Charles Clark,	John Adams,	10.

Mr. John Adams was elected chairman, and Mr. Hugh Knowles was appointed secretary of the meeting.

The chairman reported that the certificate of incorporation of the company was recorded in the office of the Clerk of Hudson County on the fifth day of April, 1909, and was filed on the same date in the office of the Secretary of State of New Jersey. The chairman presented a certified copy of said certificate of incorporation, which was ordered to be filed, and a copy thereof to be spread upon the records of the meeting.

The said certified copy was as follows :

[Here take in certified copy of certificate of incorporation.]

The secretary presented and read the waiver of notice of the meeting, which was ordered to be filed, and a copy thereof to be spread upon the records of the meeting.

The said waiver was as follows :

**"WAIVER OF NOTICE OF FIRST MEETING OF INCORPORATORS**  
**OF**  
**CONSOLIDATED STEEL COMPANY.**

We, the undersigned, being all of the incorporators of Consolidated

Steel Company, a New Jersey corporation, do HEREBY WAIVE NOTICE of the time, place, and purpose of the first meeting of the incorporators of said company, and do fix the sixth day of April, 1909, at ten o'clock in the forenoon, as the time, and the office of the Security Trust Company, Number 10 Day Street, Hoboken, New Jersey, as the place of said meeting, and do hereby waive all the requirements of the statutes of New Jersey as to notice of such meeting, and the publication thereof, and we do consent to the transaction of such business as may come before said meeting.

Dated, April 6th, 1909.

JOHN ADAMS.  
JAMES BROWN.  
CHARLES CLARK."

The secretary presented a form of by-laws for the regulation of the affairs of the company which were read, article by article, and unanimously adopted.

The said by-laws were as follows:

[Here take in by-laws.]

Upon motion,

*Resolved*, that the meeting proceed to the election of directors.

Messrs. G. H. Ivins and K. L. Munro were appointed inspectors of election, and the oath was duly administered to them.

Messrs. Henry Chamberlain, Frank M. Converse, Richard T. Frances, Lawrence K. McIntyre, and Philip Talbot were nominated for directors to hold office until the next annual meeting of the company; Messrs. George Bathurst, Arthur K. Livingston, Samuel P. Stacy, Amasa Thompson, and William K. Waring were nominated for directors to hold office until the second annual meeting of the company; Messrs. Hiram A. Hilbreth, George Ivins, Isaac Jones, Herbert S. Pendreigh and Walter M. Stickney were nominated for directors to hold office until the third annual meeting of the company.

No other nominations having been made, the polls were declared open. All the stockholders having voted by ballot, the polls were declared closed, and the inspectors presented their certificate showing that the aforesaid gentlemen had been elected directors of the company for the aforesaid terms.

Upon motion,

*Resolved*, that the principal and registered office of the company in New Jersey be established and maintained at Number 10 Day Street, Hoboken, County of Hudson, and that the Security Trust Company be, and it hereby is, appointed the agent of this corporation in charge of such principal and registered office, upon whom process against this company may be served.

Upon motion duly made and seconded, and by the affirmative vote of all the stockholders, it was



*Resolved*, that the board of directors be and they hereby are authorized to issue shares of the capital stock of this company to the full amount authorized by the certificate of incorporation, in such amounts, and at such time or times, and for such consideration as the board may determine.

Upon motion duly made and seconded, and by the affirmative vote of all the stockholders, the following preambles and resolution were adopted:

*Whereas*, Mr. James Wakefield, of Pittsburg, Pennsylvania, has offered, in consideration of the issue to him or upon his order of preferred stock in this company to the amount of one hundred thousand dollars (\$100,000) par value, and of common stock in this company to the amount of one hundred and fifty thousand dollars (\$150,000) par value, to sell to this company the following described property, to wit:

[Here take in description of property]; and

*Whereas*, in the judgment of the stockholders such property is necessary for the business of this company, and is of the fair value of two hundred and fifty thousand dollars (\$250,000);

*Resolved*, that the directors of this company be and they hereby are authorized, in their discretion, to purchase the aforesaid property for the aforesaid price, and to issue stock as aforesaid in payment thereof.

On motion, the meeting adjourned.

HUGH KNOWLES,  
*Secretary of the Meeting.*

MINUTES OF FIRST MEETING OF BOARD OF DIRECTORS  
OF  
CONSOLIDATED STEEL COMPANY.

The first meeting of the board of directors of Consolidated Steel Company was held at Number 17 Wall Street, New York City, on the sixth day of April, 1909, at two o'clock in the afternoon, pursuant to a written waiver of notice signed by all the directors, fixing the time and place aforesaid.

The following directors were present: Messrs. Chamberlain, Converse, Talbot, Bathurst, Livingston, Stacy, Jones, and Pendreigh, being a quorum of the board.

On motion, Mr. Talbot was chosen temporary chairman, and Mr. Hugh Knowles was appointed secretary of the meeting.

The secretary presented and read the waiver of notice of the meeting, which was ordered to be filed, and a copy thereof to be spread upon the records of the meeting.

The said waiver was as follows:

[Here take in waiver of notice.]

The minutes of the first meeting of the incorporators of the company were read.

Upon motion, the following gentlemen were elected officers of the company, to hold office during the pleasure of the board.

*President*: Mr. George Bathurst.

*Vice-Presidents*: Mr. John Adams and Mr. Philip Livermore.

*Treasurer*: Mr. John G. Holmes.

*Assistant Treasurer*: Mr. Hugh Knowles.

*Secretary*: Mr. Hugh Knowles.

*Assistant Secretary*: Mr. John G. Holmes.

Upon motion, the following gentlemen were chosen to constitute the executive committee of the company: Messrs. Bathurst, Chamberlain, Converse, Livingston, Jones, and Pendreigh.

Upon motion, Mr. Converse was designated to be chairman of the executive committee.

Upon motion, Mr. Brandon Livermore was appointed counsel to the company.

The president thereupon took the chair.

The secretary thereupon took and subscribed the oath of office, and entered upon the discharge of his duties. The said oath was as follows:

**"OATH OF SECRETARY****OF****CONSOLIDATED STEEL COMPANY.**

STATE OF NEW YORK, }  
COUNTY OF NEW YORK. } ss.:

Hugh Knowles, secretary of Consolidated Steel Company, a New Jersey corporation, being by me duly sworn, upon his oath deposes and says that he will faithfully discharge the duties of secretary of the aforesaid corporation to the best of his skill and ability.

HUGH KNOWLES.

Subscribed and sworn to before me,  
this sixth day of April, 1909.

JOHN K. ANDREWS,

Notary Public (17),  
New York County."

Upon motion,

*Resolved*, that the treasurer give a bond in the sum of fifty thousand dollars (\$50,000).

The treasurer thereupon presented his bond, signed by himself as principal and by the Attorneys Surety Company as surety, and the same was approved, and ordered to be filed with the secretary.

Upon motion,

*Resolved*, that the seal presented at this meeting, an impression of which is directed to be made in the minute book, be and the same hereby is adopted as the seal of the company.

The impression of said seal follows:

[Seal.]

Upon motion,

*Resolved*, that the stock book and transfer book presented at this meeting be and the same hereby are adopted as the stock book and the transfer book of the company, and the secretary is hereby directed to send the same to the registered office of the company.

Upon motion,

*Resolved*, that the treasurer be, and he hereby is, authorized to open a bank account in behalf of the company with the Empire State National Bank.

*Further Resolved*, that, until otherwise ordered, checks, notes, and other obligations may be endorsed on behalf of the company for collection, by either the treasurer, or an assistant treasurer, and deposited to the credit of the company in the said bank.

*Further Resolved*, that, until otherwise ordered, the said bank be and it hereby is authorized to make payments from the funds of this company on deposit with it, according to the check of this company signed by its president, or a vice-president, and countersigned by the treasurer or an assistant treasurer.

Upon motion,

*Resolved*, that the forms of certificates for shares of the common and preferred stock of the company presented at this meeting be and they hereby are adopted, and that such forms be spread upon the records of the meeting.

The forms of stock certificates were as follows :

[Here take in forms of stock certificates.]

Upon motion,

*Resolved*, that the Security Trust Company, a New Jersey corporation, be and it hereby is designated as the transfer agent of this company, and the New Jersey Bonding Company, a New Jersey corporation, be and it hereby is designated as the registrar of transfers, and that all certificates for shares of the capital stock of the company shall be countersigned by such transfer agent and also by such registrar of transfers.

Upon motion,

*Resolved*, that this company establish and maintain an office in Room 10, Number 17 Wall Street, New York City, and that all meetings of the board of directors shall be held at such office until otherwise ordered.

Upon motion duly made and seconded, and on the affirmative vote of all present, the following preambles and resolutions were adopted :

*Whereas*, Mr. James Wakefield, of Pittsburg, Pennsylvania, has offered, in consideration of the issue to him or upon his order of preferred stock in this company to the amount of one hundred thousand dollars (\$100,000) par value, and of common stock in this company to the amount of one hundred and fifty thousand dollars (\$150,000) par value, to sell to this company the following described property, to wit :

[Here take in description of property]; and

*Whereas*, in the judgment of the directors such property is necessary for the business of this company, and is of the fair value of two hundred and fifty thousand dollars (\$250,000) ;

*Resolved*, that it be adjudged and declared that said property is of the fair value of two hundred and fifty thousand dollars (\$250,000), and that the same is necessary for the business of the company.

*Further Resolved*, that the form of agreement for the purchase of said property presented at this meeting by the counsel to the company, be, and the same hereby is, approved, and the president or a vice-president, and the secretary or the assistant secretary are hereby

authorized and directed to execute the same, in the name of, and on behalf of the company, and under its corporate seal.

*Further Resolved*, that upon the conveyance or transfer to this company of the said property by instruments of conveyance or transfer satisfactory to the counsel to the company, the officers of this company be and they hereby are authorized and directed to prepare, sign, and seal certificates of stock pursuant to the by-laws, and to issue certificates of the full paid preferred stock of this company to the aggregate amount of one hundred thousand dollars (100,000), and of the common stock of this company to the aggregate amount of one hundred and fifty thousand dollars (\$150,000) to the said James Wakefield, or upon his order.

Upon motion, the meeting adjourned.

HUGH KNOWLES,  
*Secretary.*

CERTIFICATE OF AMENDMENT  
OF  
ORIGINAL CERTIFICATE OF INCORPORATION  
OF  
CONSOLIDATED STEEL COMPANY.

CONSOLIDATED STEEL COMPANY, a New Jersey corporation, and George Bathurst, the president, and Hugh Knowles, the secretary, of said company, do hereby certify as follows:

1. The location of the principal and registered office of the company in the State of New Jersey is at Number 10 Day Street, in the City of Hoboken, County of Hudson. The name of the agent therein and in charge thereof and upon whom process against the corporation may be served is the Security Trust Company.

2. The total authorized capital stock of said company, as set forth in its original certificate of incorporation, is five hundred thousand dollars divided into five thousand shares of the par value of one hundred dollars each, of which two thousand shares are to be preferred stock, and three thousand shares are to be common stock. Of such total authorized capital stock one thousand shares of the preferred stock and fifteen hundred shares of the common stock have heretofore been issued and are now outstanding, and no other shares of said preferred or common stock have heretofore been issued or are now outstanding.

3. The board of directors of said company, at a meeting of said board duly held, passed a resolution declaring that the changes and amendments hereinafter set forth are advisable, and calling a meeting of the stockholders to take action thereon.

4. Such meeting of the stockholders was thereupon duly held pursuant to such call of the board of directors, upon notice given to each stockholder as provided in the by-laws. At said meeting all of the stockholders of said company were present in person or represented by proxy, and more than two-thirds in interest of each class of the stockholders having voting powers — namely, all of the stockholders of said company — voted in favor of such changes and amendments which were accordingly adopted. Such changes and amendments are as follows:

A. That article fourth of the certificate of incorporation of said company be amended so as to read as follows:

*Fourth:* The total authorized capital stock of this corporation is forty million dollars, divided into four hundred thousand shares of the par value of one hundred dollars each. Of said stock two hundred thousand shares are to be preferred stock, and two hundred thousand shares are to be common stock.

The holders of such preferred stock shall be entitled to receive from the surplus or net profits arising from the business of the corporation a fixed yearly dividend of seven per centum, payable semi-annually on the 2d days of January and July in each year, before any dividend shall be set apart or paid on the said common stock.

Should the surplus or net profits arising from the business of the corporation, prior to any dividend day, be insufficient to pay the dividend upon the preferred stock, such dividend shall be payable from future profits, and no dividend shall at any time be paid upon the said common stock until the full amount of seven per centum per annum up to that time upon all the preferred stock shall have been paid or set apart. The holders of preferred stock shall be entitled to no dividends beyond the seven per centum aforesaid.

The holders of such preferred stock shall, in case of the liquidation or dissolution of the company, be entitled to be paid in full both the principal of their shares and accrued dividends before any amount shall be paid to the holders of the common stock.

And that the capital stock of said company be increased accordingly to forty million dollars, divided into four hundred thousand shares of the par value of one hundred dollars each, of which amount two hundred thousand shares, amounting to twenty million dollars, shall be preferred stock, with the rights and preferences aforesaid, and two hundred thousand shares, amounting to twenty million dollars, shall be common stock.

*B.* That the certificate of incorporation of said Consolidated Steel Company, as amended, shall read as follows:

(Here take in amended certificate of incorporation, being the original certificate of incorporation with article fourth amended as above set forth.)

5. The written assent of all the stockholders of said Consolidated Steel Company to the foregoing amendments and changes is hereto appended.

IN WITNESS WHEREOF, the said Consolidated Steel Company has caused this certificate to be signed by its president and its secretary, and its corporate seal to be hereto affixed, this 26th day of April, 1909.

GEORGE BATHURST, *President.*  
HUGH KNOWLES, *Secretary.*

{ Seal of Consolidated }  
{ Steel Company. }

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON. } ss.:

Be it remembered that on this 26th day of April, 1909, before the undersigned personally appeared George Bathurst, to me known, and known to me to be the president, and Hugh Knowles, to me known, and known to me to be the secretary, of Consolidated Steel Company, the corporation named in the foregoing certificate, and who executed the same; and, I having first made known to them and each of them the contents thereof, they did severally acknowledge that they signed and delivered the same as their voluntary act and deed.

And the said Hugh Knowles, being by me duly sworn according to law, on his oath doth depose and say that he is the secretary of the said Consolidated Steel Company; that the seal affixed to the foregoing certificate is the corporate seal of said corporation, the same being well known to him; that it was so affixed by order of said Consolidated Steel Company; that George Bathurst is president of said corporation, and signed said certificate and affixed said seal thereto, and delivered said certificate by authority of the board of directors and with the assent of all the stockholders of said corporation, as and for his voluntary act and deed, and the act and deed of said corporation, in the presence of deponent, who at the same time subscribed his name thereto as secretary of said corporation and as subscribing witness. And deponent further says that the assent hereto appended is signed by all the stockholders of said corporation.

JACOB AUSTIN,  
Master in Chancery of New Jersey.

{ Seal of the  
{ Master in Chancery. }

We, the undersigned, being all the stockholders of Consolidated Steel Company, having at a meeting regularly called for that purpose voted in favor of the changes and amendments set forth in the above certificate, do now, pursuant to law, hereby give our written assent to the said changes and alterations.

WITNESS OUR HANDS this 26th day of April, 1909.

Names.

JOHN ADAMS,	owning 10 shares of common stock.
JAMES BROWN,	" " " " " "
CHARLES CLARK,	" " " " " "
JAMES WAKEFIELD,	" 1470 " " " "
	" 1000 " " preferred "



STATE OF NEW JERSEY, }  
COUNTY OF HUDSON. } ss.:

Be it remembered that on this 26th day of April, 1909, before the undersigned personally appeared John Adams, James Brown, Charles Clark, and James Wakefield, who I am satisfied are the persons named in and who executed the foregoing instrument, and, I having first made known to them and each of them the contents thereof, they did severally acknowledge that they signed and delivered the same as their voluntary act and deed.

JACOB AUSTIN,  
Master in Chancery of New Jersey.

{ Seal of the  
{ Master in Chancery. }

LISTING OF SECURITIES  
OF  
CONSOLIDATED STEEL COMPANY.

To the Committee on Stock List of the                      Stock Exchange :

Consolidated Steel Company hereby makes application to have the following bonds and stock of said company placed on the regular list of the                      Stock Exchange :

Ten million dollars (\$10,000,000) first mortgage five per centum gold bonds, consisting of nine thousand (9000) bonds for one thousand dollars (\$1000) each, numbered from M 1 to M 9000 both inclusive, and of two thousand (2000) bonds for five hundred dollars (\$500) each, numbered from D 9001 to D 11000 both inclusive;

Ten million dollars (\$10,000,000) seven per centum cumulative preferred stock;

Ten million dollars (\$10,000,000) common stock.

Consolidated Steel Company was organized on April 6, 1909, under the laws of the State of New Jersey, and its certificate of incorporation was amended on April 26, 1909.

The company has acquired under the laws of the States of New Jersey, Pennsylvania, and New York, by direct conveyance, free of liens, the following property :

The plant, stock in trade, good will, and all other assets of the iron business formerly carried on in Pittsburg, Pennsylvania, by James Wakefield, doing business as James Wakefield and Company ;

The plant, stock in trade, good will, and all other assets of the business formerly carried on in Lebanon, Pennsylvania, by the Lebanon Iron Company, a Pennsylvania corporation ;

The plant located in Buffalo, New York, formerly owned by the Delaware Iron Company, a Pennsylvania corporation, and commonly known as the Buffalo Mill, together with all the stock in trade in said plant.

The company has also acquired the following securities :

Three million dollars (\$3,000,000) six per centum first mortgage bonds of the Delaware Iron Company, part of a total of four million eight hundred thousand dollars (\$4,800,000) of such bonds issued by said company and now outstanding;

Five thousand and thirty-three (5033) shares of the common stock of the Delaware Iron Company out of a total of ten thousand (10,000) shares of common stock issued by said company and now outstanding (no preferred stock having been issued by said company).

Consolidated Steel Company had on the 27th day of April, 1909, one

million eight hundred seventy-three thousand four hundred thirty-two dollars and forty-three cents (\$1,873,432.43) in its treasury.

#### FIRST MORTGAGE FIVE PER CENTUM GOLD BONDS.

These bonds bear date April 27, 1909; mature January 1, 1929; bear interest from January 1, 1909, payable January 1 and July 1; are payable, principal and interest, at the office of Black and Company in the city of New York in gold coin of the United States of America of or equal to the present standard of weight and fineness without deduction for any tax or taxes which the company may be required to pay thereon and retain therefrom under any present or future law of the United States of America or of any state, county, or municipality thereof; and they or any of them are redeemable at the option of the company on six months' notice on January 1, 1919, or any interest day thereafter, at five per centum premium and accrued interest. The said bonds are of an issue limited to the principal amount of twenty million dollars (\$20,000,000) at any one time outstanding. The bonds are in coupon form with the right of registration as to principal. The trustee of the mortgage is Interborough Trust Company of New York. The transfer agency for the registered bonds will be at the office of the company in New York City.

To secure said bonds the company has executed and delivered to Interborough Trust Company of New York its first mortgage dated April 27, 1909, covering the properties in Pittsburg, Lebanon, and Buffalo above mentioned, and the stock and bonds also above mentioned, and such other properties as are in said mortgage more particularly described.

#### SEVEN PER CENTUM CUMULATIVE PREFERRED STOCK.

The holders of such preferred stock are entitled to receive from the surplus or net profits arising from the business of the corporation a fixed yearly dividend of seven per centum, payable semi-annually on the 2d days of January and July in each year, before any dividend is set apart or paid on the common stock.

Should the surplus or net profits arising from the business of the corporation prior to any dividend day be insufficient to pay the dividend upon the preferred stock, such dividends are payable from the future profits, and no dividend is at any time to be paid upon the common stock until the full amount of seven per centum per annum up to that time upon all the preferred stock shall have been paid or set apart. The holders of preferred stock are entitled to no dividends beyond the seven per centum aforesaid.

The holders of preferred stock are entitled in case of the liquidation or dissolution of the company to be paid in full both the principal of their shares and accrued dividends before any amount is paid to the holders of the common stock.

The total amount of the preferred stock authorized is twenty million dollars (\$20,000,000), ten million dollars (\$10,000,000) of which has been issued.

#### COMMON STOCK.

The total amount of the common stock authorized is twenty million dollars (\$20,000,000), of which ten million dollars (\$10,000,000) has been issued.

The board of directors of Consolidated Steel Company is constituted as follows:

Messrs. Henry Chamberlain, Frank M. Converse, Richard T. Frances, Lawrence K. McIntyre, Philip Talbot, George Bathurst, Arthur K. Livingston, Samuel P. Stacy, Amasa Thompson, William K. Waring, Hiram A. Hilbreth, George Ivins, Isaac Jones, Herbert S. Pendreigh, and Walter M. Stickney.

The officers of Consolidated Steel Company are as follows:

*President:* Mr. George Bathurst.

*Vice-Presidents:* Mr. John Adams and Mr. Philip Livermore.

*Treasurer:* Mr. John G. Holmes.

*Assistant Treasurer:* Mr. Hugh Knowles.

*Secretary:* Mr. Hugh Knowles.

*Assistant Secretary:* Mr. John G. Holmes.

The principal office of Consolidated Steel Company is at No. 10 Day Street, in the city of Hoboken, County of Hudson, State of New Jersey; the company also maintains offices at No. 17 Wall Street, New York City, and at No. 3 Scranton Street, Lebanon, Pennsylvania.

Herewith are submitted:

1. Copy of the certificate of incorporation of Consolidated Steel Company.
2. Copy of the amended certificate of incorporation of Consolidated Steel Company.
3. Seven copies of the first mortgage of Consolidated Steel Company, including one copy certified by Interborough Trust Company of New York to be a true copy of the original.
4. Certificate of Interborough Trust Company of New York acknowledging the acceptance of the trust under said first mortgage, stating the securities held under the trust, and giving the numbers of the first mortgage bonds executed in accordance with the terms of the mortgage.
5. Copy of the by-laws of Consolidated Steel Company.
6. Opinion of counsel.
7. Balance sheet of Consolidated Steel Company, as of May 1, 1909, certified by Strong, Longmead, and Company.
8. Statement of earnings and expenses of the three businesses car-

ried on in the plants above mentioned for the year ending January 1, 1909, also certified by Strong, Longmead, and Company.

9. Sample copies of bonds, coupons, and stock certificates.

CONSOLIDATED STEEL COMPANY,

By GEORGE BATHURST,

*President.*

Accompanying the foregoing application was the following opinion of counsel :

To the Committee on Stock List of the

Stock Exchange :

GENTLEMEN :

We have examined the certificate of incorporation of Consolidated Steel Company, a New Jersey corporation, and the amendments thereto, and the proceedings relating to the organization of that company and to the issue of its preferred and common stock.

We are of opinion that said company has been legally incorporated and organized under the laws of the State of New Jersey ; that it has power to issue seven per centum cumulative preferred stock to the par amount of twenty million dollars (\$20,000,000) and common stock to the par amount of twenty million dollars (\$20,000,000) ; that preferred stock to the amount of ten million dollars (\$10,000,000) and common stock to the amount of ten million dollars (\$10,000,000) has been issued in due form, and that the action of the directors and stockholders of said company in respect of said stock, both preferred and common, was in conformity with the laws of the State of New Jersey.

We have also examined the first mortgage dated April 27, 1909, made by said company to Interborough Trust Company of New York as trustee to secure an issue of its five per centum first mortgage gold bonds, and we are of opinion that the action of the directors and stockholders of said company in respect to this mortgage was in conformity with law, that the said mortgage is a valid lien on the properties therein mentioned, and that the bonds issued under said mortgage are valid and binding obligations of said company.

Yours faithfully,

STOCKTON AND LIVERMORE.

## APPENDIX OF CORPORATE FORMS.

### SYNDICATE AGREEMENT.

**Agreement**, made this fifth day of April, one thousand nine hundred and nine, by and between Brown & Company and Jones & Company, of New York, and Smith & Company, of London, as Readjustment Managers (hereinafter called the "Readjustment Managers"), parties of the first part; Talbot & Company, of London, Watkins & Company and Weill & Company, of New York, as Syndicate Managers (hereinafter called the "Syndicate Managers"), parties of the second part; and the Syndicate Subscribers hereto (hereinafter called the "Subscribers"), parties of the third part, who together with the Syndicate Managers constitute the Syndicate, each subscriber being bound only ratably to the extent of his own subscription and not for any other subscriber or subscription.

*Whereas*, pursuant to a certain plan and agreement of readjustment, dated April 5, 1909, about to be issued, it is proposed to undertake a readjustment of the affairs of the New York & Buffalo Railroad Company on the basis of an issue of twenty million dollars (\$20,000,000) Prior Lien 4½ per cent Gold Mortgage Bonds (which issue may for the purposes in said plan specified be increased as therein stated), and fifteen million dollars (\$15,000,000) First Consolidated Mortgage 4 per cent Gold Bonds (which issue may be increased for the purposes in the said plan specified as therein stated), and of an issue of twenty-five million dollars (\$25,000,000) in Four Per Cent Non-Cumulative Preferred Stock (which issue may for the purposes in said plan specified be increased as therein stated), and of thirty-three million three hundred and fifty thousand dollars (\$33,350,000) in New Common Stock; it being understood that to the extent that the existing bonds shall not be exchanged for new securities under the offer in the plan, or not retired by payment on redemption or in dissolution proceedings, or otherwise, the new securities respectively apportioned to such bonds under the plan shall be reserved for the ultimate redemption thereof; and

*Whereas*, in order to provide the cash requirements of said plan as hereinafter set forth, the Readjustment Managers have undertaken to form a syndicate to which the parties of the third part desire to be admitted as subscribers, and it is proposed that to the extent and in the manner hereinafter provided the Syndicate shall provide such cash requirements of the said plan and purchase the new securities as hereinafter provided;

*Now, this Agreement Witnesseth*, that in consideration of the mutual promises herein contained, the parties hereto agree with each other and with the Readjustment Managers and the Syndicate Managers, the said Syndicate Subscribers agreeing each for himself and not for any other, as follows:

*First.* The parties of the second and third parts hereto hereby form a syndicate for the purpose of providing the cash requirements of the said Plan of Readjustment of the New York & Buffalo Railroad Company. The maximum amount or obligation of the syndicate shall not exceed the sum of twenty-five million dollars (\$25,000,000), and such obligations shall be divided and apportioned as recited in this agreement. This agreement shall not take effect until the said maximum amount shall have been subscribed.

*Second.* The syndicate agrees to take and pay for and the Readjustment Managers will sell and deliver the following new securities when issued, or certificates therefor entitling the holders to the new securities when issued, viz.:

(1) \$9,221,000.00 Prior Lien 4½ Per Cent Gold Mortgage Bonds.

\$3,595,312.50 First Consolidated Mortgage 4 Per Cent Gold Bonds.

\$2,400,000.00 New 4 Per Cent Preferred Stock (Trust Certificates) for the sum of twelve million nine hundred and sixty-seven thousand three hundred and sixty-seven dollars (\$12,967,367), plus any interest accrued on said bonds when delivered.

(2) The Syndicate, if so requested by the Readjustment Managers, will further take and pay for such part of the \$10,779,000 new Prior Lien 4½ Per Cent Gold Mortgage Bonds (or Certificates therefor entitling the holders to such new Bonds when issued), which under the Plan are to be offered to the holders of the present outstanding New York & Buffalo Railroad Company First Mortgage (Prior Lien) 6 Per Cent Bonds, as may not be taken by them within the time limit fixed by the Readjustment Managers, at the price of \$985 per bond, plus any interest accrued on said bonds when delivered.

(3) The Syndicate further agrees with the Readjustment Managers to advance to them or on their order cash not exceeding in the aggregate the sum of ten million dollars (\$10,000,000) if the Readjustment Managers shall in their discretion deem that such cash advances will tend to promote the consummation of the Plan of Readjustment, as follows, viz.:

(a) To advance moneys on the security of the existing bonds or coupons or stock trust certificates of the New York & Buffalo Railroad or certificates issued by the Readjustment Managers entitling their holders to new securities when issued, or upon other securities satisfactory to the Syndicate Managers.

(b) To advance cash to purchase any properties whose securities are owned by the New York & Buffalo Railroad Company, or any part thereof, on any sale of said properties in dissolution proceedings or otherwise.

The Syndicate shall make such advances from time to time upon twenty days' written notice from the Readjustment Managers to the Syndicate Managers. Such advances shall be repaid with interest at the rate of 6 per cent per annum out of the proceeds of the new securities deliverable hereunder. The Readjustment Managers, however,

shall in no event be personally liable in respect of any obligation, advance, purchase or loan hereunder.

*Third.* Each subscriber signing this agreement shall set opposite his name and address the amount of his subscription to the Syndicate, and shall from time to time and at any time on call of the Syndicate Managers make cash payments on account of his subscription hereunder. Not over five million dollars (\$5,000,000) (twenty per cent) in money in the aggregate shall be called from the Syndicate subscribers in any one month. Payments from the subscribers shall be due ten days after the sending of written notice from the Syndicate Managers to the subscribers, and such notice shall be by letter to the subscribers in the United States and by cable or letter to those in Europe at the addresses of the respective subscribers written below, or at such other addresses as may be furnished in writing to the Syndicate Managers by the subscribers respectively. Each subscriber shall be called upon to pay and shall be liable only for such amount as shall bear to the total obligation payable by the Syndicate as ascertained from time to time the same ratio or proportion as his subscription hereunder written bears to the maximum obligation of the Syndicate as fixed in this agreement. The Syndicate Managers may at any time in their discretion distribute among the subscribers pro rata any securities acquired or held hereunder; but until the termination of the Syndicate, unless the Syndicate Managers shall otherwise notify the subscribers in writing, no securities so delivered to subscribers shall be sold by them, but they shall all be held by the subscribers subject to the order and control of the Syndicate Managers, to be returned to said Syndicate Managers upon demand or their order, for sale or exchange on Syndicate account.

*Fourth.* The Readjustment Managers shall pay to the Syndicate Managers for the benefit of the several Syndicate subscribers in proportion to their respective subscriptions a commission or compensation of three per cent (3 per cent) in cash on the amount of their subscriptions hereunder regardless of the amount which the Syndicate shall be called upon to pay or advance. Such compensation shall be paid from time to time, as the Readjustment Managers and Syndicate Managers shall determine.

*Fifth.* Deliveries of the respective new securities shall be made with reasonable promptness after completion of the readjustment in New York and London in such proportions as the Syndicate Managers shall request. The Syndicate shall continue in force and operation until one year after the delivery of the new securities, unless sooner terminated by the Syndicate Managers in their discretion and at their option upon notice to the subscribers.

*Sixth.* The Plan of Readjustment may be modified from time to time by the Readjustment Managers as provided in the Readjustment Agreement. Thereupon this agreement shall apply to such modified plan, and, if, as a result of such modification, a less amount of cash shall



be required for the purposes of the readjustment, the amount of any class or classes of securities to be sold as specified in Paragraph Second, may be reduced. In such case the amount to be paid by the Syndicate shall be diminished, as may be agreed upon, between the Syndicate Managers and the Readjustment Managers. The Readjustment Managers may finally abandon the plan, including all modifications thereof, and in such event this agreement shall cease to be of any future effect, and no compensation thereunder shall be due to the Syndicate; but any advance theretofore made by the Syndicate under subdivision 3 of Article Second of this agreement shall be repaid with interest at the rate of six per cent per annum, and any securities theretofore purchased and then held for Syndicate account may thereafter be sold and the proceeds distributed among the Syndicate subscribers at such time or times and in such amounts as the Syndicate Managers shall determine, not later, however, than one year after the final abandonment of the plan.

*Seventh.* The failure of any Syndicate subscriber to perform any of his undertakings hereunder shall not affect or release any other Syndicate subscriber, and upon such failure the Syndicate Managers shall have the right at their option to exclude such subscriber from further interest and participation in the Syndicate and to forfeit any payments he may have theretofore made thereunder, and to recover all damages resulting from his failure. The Syndicate Managers may in their discretion by written consent release any subscriber, and may accept new subscribers from time to time in the place of any subscriber so failing or released. Each subscriber shall be liable hereunder solely to the Syndicate Managers and the Readjustment Managers and their assigns and only for such ratable part of the obligations of the Syndicate as the amount of his subscription bears to \$25,000,000. Nothing contained in this agreement or otherwise shall constitute the subscribers partners with one another or with the Syndicate Managers or render them liable to contribute in any event more than their ratable amount as aforesaid. The Readjustment Managers shall in no event be personally liable in respect to any loss incurred hereunder.

*Eighth.* All the bonds and stocks purchased by the Syndicate as aforesaid, and all net proceeds resulting from the sales of any such bonds or stock, or from any other transaction of the Syndicate Managers for account of the Syndicate under any of the provisions hereof, after payment of any and all expenses and obligations incurred by the Syndicate Managers under the provisions of this agreement, and the repayment of any advances made by the Syndicate, shall be distributed among the Syndicate subscribers pro rata by the Syndicate Managers at any time when they shall decide to terminate this agreement, or from time to time when and as the Syndicate Managers may deem expedient. The word "stock," whenever used herein to describe any securities to be deposited hereunder, shall include stock voting trust certificates.

*Ninth.* The Syndicate Managers may sell any bonds or stocks held hereunder to any other subscriber, and any such other subscriber may make any purchase from the Syndicate Managers. The Syndicate Managers shall have absolute control over the disposition of all stock held by them, and they may cause the same to be transferred to themselves, or as they deem expedient, to any person or persons, corporation or corporations. While so held by them or under their control the Syndicate Managers shall have the exclusive right, and discretionary power is hereby conferred upon them, to vote upon such stock or to cause the same to be voted by their nominees or by any proxies appointed or selected by them at all meetings of stockholders for the election of directors of the company, stock in which is so held, and for any and all purposes whatsoever. The Syndicate Managers shall have the sole management and conduct of the Syndicate. The subscribers therefore nominate and irrevocably appoint the Syndicate Managers their agents and attorneys, with full power and authority to do any and all acts and enter into and execute any and all agreements and arrangements deemed by the Syndicate Managers necessary, proper or expedient to carry out and perform the objects and terms of this agreement substantially as herein set forth, or to promote or protect what they may deem the best interests of the Syndicate, including full power and authority to make purchases and sales in the market, or otherwise, for account of the syndicate, of the existing bonds and stock (voting trust certificates) of the New York & Buffalo Railroad Company, or of other existing securities for which new securities are provided to be issued under the Plan; or of Certificates of Deposit or receipts for any such bonds or stock, or in coupons now or subsequently matured and unpaid belonging to any such bonds; deposits of the same under the Plan; purchases and sales of the new securities (or certificates entitling the holders to the new securities as issued), and generally to have such transactions in said existing and other bonds and stock and new securities or certificates therefor as they may deem best for the interests of the Syndicate; provided, however, that the total cash obligation to be incurred by the Syndicate for such purchases and for advances shall never exceed the sum of twenty-five million dollars (\$25,000,000) at any one time as stated in Paragraph First hereof.

*Tenth.* To accomplish the objects and purposes of this Syndicate, each subscriber hereby ratifies and assents to any action of the Syndicate Managers taken under this agreement, and agrees to perform his undertakings hereunder from time to time promptly on the call of the Syndicate Managers to the full extent of the amount of his subscription set opposite his name hereto subscribed. The enumeration of particular or specific powers in this agreement shall not be considered as in any way limiting or abridging the general powers and discretion intended to be conferred upon and reserved to the Syndicate Managers in order to fully authorize them to do any and all

things by them in their discretion deemed necessary, proper or expedient to carry out the purposes of this agreement, and to aid, effectuate or consummate the Plan for readjusting the finances of the New York & Buffalo Railroad Company.

*Eleventh.* The Syndicate Managers shall not be liable under any of the provisions of this agreement or any matter connected therewith, and in like manner, the Readjustment Managers shall not be liable under any of the provisions of this agreement or any matter connected therewith, except in each instance for good faith and the exercise of reasonable diligence. The Syndicate Managers and the Readjustment Managers, and each of the above-named firms or any member of any of said firms, may respectively become Syndicate subscribers hereto, and in that event they shall be liable for their Syndicate subscriptions, and shall participate in the profits and losses of the Syndicate in the same way as and ratably with other Syndicate subscribers. All expenses of the Syndicate Managers, including counsel fees, brokerages paid in marketing bonds, &c., shall be charged to the Syndicate and all profits and losses of the Syndicate divided and borne pro rata, and each Syndicate subscriber agrees to pay to the Syndicate Managers on demand his ratable share of any such losses.

*Twelfth.* So far as practicable, the three firms, as such Syndicate Managers, shall act and concur in all steps and proceedings hereunder, but in event of the three firms not concurring, the concurrent action of any two of said firms shall be the action of the Syndicate Managers, and no action shall be taken except with the assent of at least two of said firms. The said firms shall each act as a co-partnership, and in case of any change in any of said firms the respective firms of Talbot & Company, Watkins & Company, and Weill & Company, or their respective successor firms as from time to time constituted, shall continue as Syndicate Managers, with all the powers, rights and title vested in the Syndicate Managers hereunder.

*Thirteenth.* Each and every party hereto upon reasonable request, will from time to time execute, deliver and perform all written agreements necessary or proper to carry this agreement into effect.

*Fourteenth.* All notices to American members of the Syndicate shall be signed by or for Watkins & Company and by or for Weill & Company, for the Syndicate Managers, but if for any reason it be impracticable to have the signature of both firms the signature of either firm shall be sufficient, provided the notice has been authorized by the Syndicate Managers, as provided in Paragraph Twelfth hereof. All notices to other members shall be sufficient if signed by or for Talbot & Company.

*Fifteenth.* This agreement shall be deemed to apply to and bind the legal representatives and assigns of the respective subscribers, but no assignment hereunder shall be valid unless assented to in writing by the Syndicate Managers.

*Sixteenth.* Nothing herein contained shall be construed as creating

any trust or obligation whatsoever in favor of the New York & Buffalo Railroad Company, or in favor of any person or corporation other than the subscribers, nor any obligation in favor of the subscribers, except only as is herein expressly provided.

*Seventeenth.* Six copies of this agreement shall be signed by the Syndicate Managers and the Readjustment Managers, and one of such copies lodged with each of the firms composing the Syndicate Managers and one with each of the firms composing the Readjustment Managers, and other copies may be signed by any of the subscribers, but all of the different copies so signed shall together constitute but one agreement.

*In witness whereof,* the parties of the first and second parts hereto have hereunto subscribed their names, and the Subscribers, parties of the third part, have hereunto subscribed their names, addresses and the amounts of subscriptions made by them respectively the day and year aforesaid.

BROWN & Co.,  
JONES & Co.,  
SMITH & Co.,

} *Readjustment Managers.*

TALBOT & Co.,  
WATKINS & Co.,  
WEILL & Co.,

} *Syndicate Managers.*

NAME OF SUBSCRIBER.	ADDRESS TO WHICH NOTICES ARE TO BE SENT.	AMOUNT OF SUBSCRIPTION.

## ALBEMARLE AND BRISTOL RAILROAD COMPANY.

### VOTING TRUST AGREEMENT.

Dated April 5th, 1909.

**Agreement**, made the 5th day of April, 1909, by and between Norcross & Co., Robinson, Cromwell & Co., and Tracy Brothers, all of New York City (hereinafter called the Managers), as Readjustment Managers under a certain plan and agreement for the readjustment of The Albemarle, Charlton, and Bristol Railroad Company, dated the 1st day of October, 1908, parties of the first part; George A. Norcross, William A. Robinson, and Edward C. Tracy (hereinafter called the Voting Trustees), parties of the second part; and holders of the trust certificates, hereinafter mentioned, parties of the third part,

**Witnesseth :**

*Whereas*, Albemarle and Bristol Railroad Company has been organized under the laws of the State of Alabama, and, pursuant to said plan and agreement of readjustment, has acquired certain railroads and property formerly of The Albemarle, Charlton, and Bristol Railroad Company; and

*Whereas*, said Albemarle and Bristol Railroad Company has authorized an issue of its First Mortgage Gold Bonds, payable January 1, 1939, with interest from January 1, 1909, at the rate of four per cent per annum, secured by a mortgage or deed of trust dated April 5, 1909, to Interborough Trust Company of New York, as Trustee, on certain of its railroads and property; and has also authorized an issue of its First Consolidated Mortgage Gold Bonds, payable January 1, 1959, with interest from January 1, 1909, at the rate of four per cent per annum, secured by a mortgage or deed of trust dated April 5, 1909, to Mutual Trust Company of New York, as Trustee, on its railroads and property; and

*Whereas*, in pursuance of said plan and agreement of readjustment, the Managers, as additional protection to said mortgage bonds, have delivered to the Voting Trustees certificates for two hundred and ninety-nine thousand, nine hundred and fifty full-paid shares, of one hundred dollars each, of the capital stock of Albemarle and Bristol Railroad Company, and said certificates, together with such other similar certificates as hereafter from time to time may be delivered hereunder, are to be held and disposed of by the Voting Trustees under and pursuant to the terms and conditions hereof;

Now, therefore, the Voting Trustees do agree with the Managers, and with each and every holder of certificates issued as hereinafter provided, as follows:

*First:* The Voting Trustees will from time to time, upon request, cause to be issued to the Managers, or upon their order, in respect of all certificates of stock received from them, certificates in substantially the following form:

[Here take in form of trust certificate.]

*Second:* On the first day of January, 1914, if Albemarle and Bristol Railroad Company shall then have paid, for two consecutive years, a four per cent cash dividend on its stock, or, if not, then as soon as such dividend shall for two consecutive years have been so paid; or whenever, although prior to the payment of such dividends, the Voting Trustees shall decide to make such delivery, the Voting Trustees, in exchange for and upon surrender of any trust certificate then outstanding, will, in accordance with the terms hereof, deliver certificates of stock of Albemarle and Bristol Railroad Company, and may require the holders of trust certificates to exchange them for certificates of stock.

*Third:* The Voting Trustees possess and shall be entitled to exercise until the actual delivery of certificates of stock in exchange for trust certificates, all rights and powers of owners of said stock including the unrestricted right to vote for every purpose and to consent to any corporate act of said Railroad Company, it being expressly stipulated that no voting right passes by or under said trust certificates, or by or under this agreement, or by or under any agreement express or implied. The Voting Trustees will not, however, during the pendency of this agreement, vote in respect of the shares of stock held by them to authorize any mortgage, additional to the First Mortgage and the First Consolidated Mortgage of said Railroad Company, upon the property acquired under said plan and agreement of readjustment dated October 1, 1908, or to authorize the issue of preferred stock of said Railroad Company, except with the consent in each instance of the holders of trust certificates representing a majority of the whole amount of the stock of said Railroad Company held by the Voting Trustees, such consent to be given in person or by proxy at a meeting called by the Voting Trustees for that purpose.

*Fourth:* The trust certificates issued hereunder shall be transferable upon the books of the Voting Trustees by the registered holder, either in person or by attorney, on surrender of the trust certificates, properly indorsed, and according to the rules established by the Voting Trustees for the regulation of transfers. Until so transferred, every registered holder for the time being of every such trust certificate may be treated by the Voting Trustees as the owner thereof for all purposes whatsoever.

*Fifth:* So long as any trust certificate is properly outstanding the registered holder thereof shall be entitled to the payment of a sum equal in amount to any and all dividends that have been declared on the shares held by the Voting Trustees against such trust certificates as soon as such dividends have been collected by the Voting Trustees, less such fraction of the expenses of the Voting Trustees herein provided for as the shares so held against such trust certificate are of the total number of the shares held by the Voting Trustees at the time such expenses were incurred.

*Sixth:* In voting the stock held by them, the Voting Trustees will exercise their best judgment from time to time in selecting suitable directors to the end that the affairs of the said Railroad Company shall be properly managed; and in voting and in taking action on other matters which may come before them as stockholders they will likewise exercise their best judgment; but they assume no responsibility in respect to such management or in respect of any action taken pursuant to their consent thereto as such stockholders.

The Voting Trustees may execute any of the trusts or powers hereof and perform any duty hereby required by or through their attorneys, officers, agents, or servants, and shall be entitled to advice of counsel in all matters concerning the trusts hereof and their duties hereunder. The Voting Trustees shall be answerable only for their own several acts, receipts, neglects, and defaults, and not for those of each other, nor for those of any person employed by them and selected with reasonable care, nor for loss unless the same shall happen through the individual wilful default of the individual trustee charged therewith.

The Voting Trustees shall be authorized in all cases to pay such reasonable remuneration as they shall deem proper to all attorneys, officers, agents, and employees that they may reasonably employ in the management of the trusts and powers hereof, and all such remuneration and all other reasonable expenses and disbursements of the Voting Trustees including their own reasonable remuneration shall be paid out of dividends received in respect of the shares of stock held by them.

Any Voting Trustee may act as a director or officer of the said Railroad Company.

*Seventh:* Any Voting Trustee may, at any time, resign by delivering to the other Voting Trustees his resignation in writing to take effect ten days thereafter; and, in every case of death or resignation or of the inability of any Voting Trustee to act, the vacancy so occurring shall be filled as follows: the successor or successors from time to time of George A. Norcross shall be appointed by Norcross & Co., or the successors of said firm; the successor or successors from time to time of William A. Robinson shall be appointed by Robinson, Cromwell & Co., or the successors of said firm; the successor or successors from time to time of Edward C. Tracy shall be appointed by

Tracy Brothers, or the successors of said firm, the instruments of appointment being lodged with the other Voting Trustees. The term Voting Trustees, as herein used, shall apply to the parties of the second part and their successors hereunder.

*Eighth* : All action to be taken by, or questions arising among, the Voting Trustees from time to time shall be determined by the decision of a majority of those then acting as Voting Trustees. Such decision may be evidenced by a writing signed by the Voting Trustees, or a majority thereof, and, if so evidenced, no meeting of the Voting Trustees for the purpose of considering the matter so decided shall be requisite.

*Ninth* : All notices to be given to the holders of trust certificates shall be mailed to such holders at the addresses last furnished by them to the Voting Trustees, provided they shall have furnished addresses. No holder of a trust certificate who fails to furnish an address to the Voting Trustees shall be entitled to receive any notice from the Voting Trustees of any proceedings taken hereunder.

*Tenth* : The term Albemarle and Bristol Railroad Company for the purpose of this agreement, and for all rights hereunder, including the issue and delivery of stock, shall be taken to mean the said corporation organized under the laws of the State of Alabama or any successor or consolidated corporation.

*Eleventh* : From time to time hereafter, the Voting Trustees may receive certificates for additional full-paid shares of the stock of said Railroad Company, and, in respect of all such certificates so received, the Voting Trustees may issue and deliver trust certificates similar to those above mentioned, entitling the holders to the rights therein specified.

IN WITNESS WHEREOF, the parties of the first and second parts have hereunto set their hands in the city of New York the day and year first above written. This agreement shall become binding upon the holders of trust certificates upon their acceptance of such certificates.

NORCROSS & Co.,  
ROBINSON, CROMWELL & Co.,  
TRACY BROTHERS,  
*Readjustment Managers.*

GEORGE A. NORCROSS,  
WILLIAM A. ROBINSON,  
EDWARD C. TRACY,  
*Voting Trustees.*





Certificate  
for less  
than  
100 shares

Number  
D 3

Shares  
20

Certificate  
for less  
than  
100 shares

# CONSOLIDATED STEEL COMPANY

Incorporated under the laws of the State of New Jersey.

## AUTHORIZED CAPITAL:

Preferred Stock \$20,000,000      Common Stock \$20,000,000  
Shares \$100 each.

**This Certifies that** John Adams <sup>ten</sup> full-paid shares of the Common Stock of Consolidated Steel Company, transferable only on the books of the Company by the holder in person, or by attorney, on surrender of this certificate, properly indorsed.

The shares above described are a part of a total common stock of twenty million dollars, authorized by the amended certificate of incorporation of the Company filed in the office of the Secretary of State of New Jersey on the twenty-sixth day of April, 1909. A total preferred stock of twenty million dollars is also authorized by the said amended certificate.

The Preferred Stock, as more fully provided in said amended certificate, is entitled, in preference to the Common Stock, to cumulative dividends at the rate of seven per centum yearly, and on distribution of assets to payment of its par value and the amount of such cumulative dividends then unpaid, but to no other dividend or payment.

This certificate shall not be valid unless countersigned by the Transfer Agent, and by the Registrar of Transfers.

~~Witness~~ the seal of the Company and the signatures of its duly authorized officers, this 27th day of April, 1909.

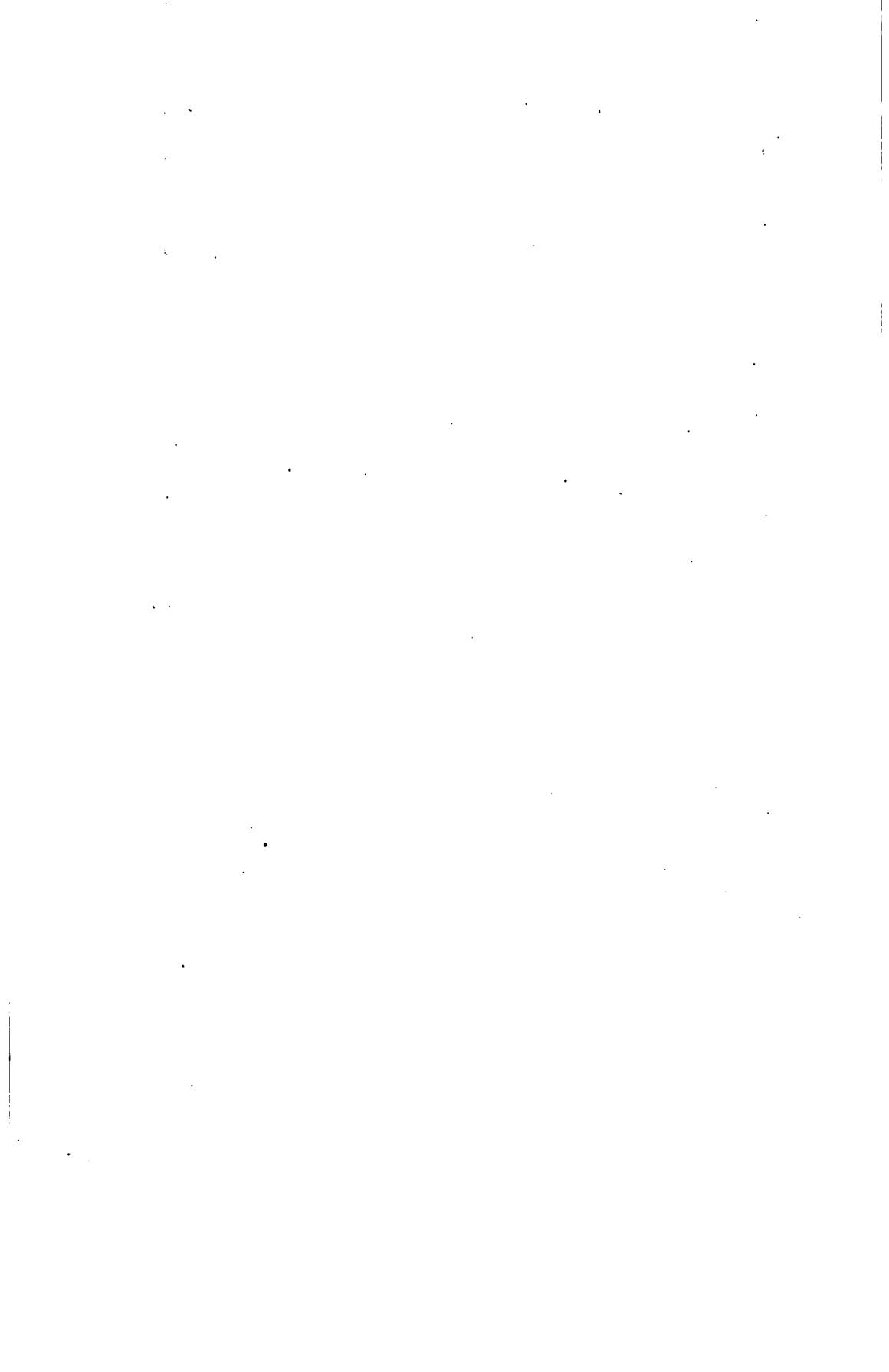
Hugh Knowles, Assistant Treasurer.

{  
Seal  
of  
Consolidated  
Steel Company

Philip Livermore, Vice-President.

Registered: April 28, 1909,  
New Jersey Bonding Company, Registrar of Transfers.  
By C. W. McIlvaine, Assistant Secretary.

Countersigned: April 28, 1909,  
Security Trust Company, Transfer Agent.  
By G. E. Goodspeed, Treasurer.



Certificate  
for less  
than  
100 shares

Number  
D 3

Shares  
10

Certificate  
for less  
than  
100 shares

# CONSOLIDATED STEEL COMPANY

Incorporated under the laws of the State of New Jersey.

## AUTHORIZED CAPITAL:

Preferred Stock \$20,000,000      Common Stock \$20,000,000  
Shares \$100 each.

**This Certifies** that \_\_\_\_\_ *John Adams* \_\_\_\_\_ full-paid shares of the  
is the registered holder of \_\_\_\_\_ *ten* \_\_\_\_\_ Common Stock of Consolidated Steel Company, transferable only on the books of the Company by the  
holder in person, or by attorney, on surrender of this certificate, properly indorsed.

The shares above described are a part of a total common stock of twenty million dollars, authorized by the amended certificate of incorporation of the Company filed in the office of the Secretary of State of New Jersey on the twenty-sixth day of April, 1909. A total preferred stock of twenty million dollars is also authorized by the said amended certificate.

The Preferred Stock, as more fully provided in said amended certificate, is entitled, in preference to the Common Stock, to cumulative dividends at the rate of seven per centum yearly, and on distribution of assets to payment of its par value and the amount of such cumulative dividends then unpaid, but to no other dividend or payment.

This certificate shall not be valid unless countersigned by the Transfer Agent, and by the Registrar of Transfers.

~~Witness~~ the seal of the Company and the signatures of its duly authorized officers, this 27th day of April, 1909.

Hugh Knowles, Assistant Treasurer.

Seal of  
Consolidated  
Steel Company

Philip Livermore, Vice-President.

Registered : April 28, 1909.  
New Jersey Bonding Company, Registrar of Transfers.  
By C. W. McIlwaine, Assistant Secretary.

Countersigned : April 28, 1909,  
Security Trust Company, Transfer Agent.  
By G. E. Goodspeed, Treasurer.

For value Received \_\_\_\_\_ hereby sell, assign, and transfer unto  
\_\_\_\_\_  
\_\_\_\_\_ shares  
of the Capital Stock represented by the within Certificate and do  
hereby irrevocably constitute and appoint \_\_\_\_\_  
Attorney, to transfer the said stock on the Books of the within named  
Company with full power of substitution in the premises.

Dated \_\_\_\_\_ 19 \_\_\_\_\_.

\_\_\_\_\_

In presence of

Certificate  
for less  
than  
100 shares

Number  
17

# CONSOLIDATED STEEL COMPANY

Shares  
10

Certificate  
for less  
than  
100 shares

Incorporated under the laws of the State of New Jersey.

## AUTHORIZED CAPITAL:

Preferred Stock \$20,000,000    Common Stock \$20,000,000  
Shares \$100 each.

This Certificate that James Wakefield is the registered holder of ten full-paid shares of the Preferred Stock of Consolidated Steel Company, transferable only on the books of the Company by the holder in person, or by attorney, on surrender of this certificate, properly indorsed.

The shares above described are a part of a total preferred stock of twenty million dollars, authorized by the amended certificate of incorporation of the Company filed in the office of the Secretary of State of New Jersey on the twenty-sixth day of April, 1909. A total common stock of twenty million dollars is also authorized by the said amended certificate.

The Preferred Stock, as more fully provided in said amended certificate, is entitled, in preference to the Common Stock, to cumulative dividends at the rate of seven per centum yearly, and on distribution of assets to payment of its par value and the amount of such cumulative dividends then unpaid, but to no other dividend or payment.

This certificate shall not be valid unless countersigned by the Transfer Agent, and by the Registrar of Transfers.

Witness the seal of the Company and the signatures of its duly authorized officers, this 27th day of April, 1909.

Hugh Knowles, Assistant Treasurer.

Seal  
of  
Consolidated  
Steel Company

Philip Livermore, Vice-President.

Registered: April 28, 1909.  
New Jersey Bonding Company, Registrar of Transfers.  
By C. W. McIlwaine, Assistant Secretary.

Countersigned: April 28, 1909,  
Security Trust Company, Transfer Agent.  
By G. E. Goodspeed, Treasurer.



**Consolidated Steel Company.      \$25**

On the 1st day of July, 1900, Consolidated Steel Company, a New Jersey corporation, will pay to bearer at the office of Black and Company in the city of New York twenty-five dollars (\$25) in gold coin, without deduction for taxes, for six months' interest then due on its First Mortgage Gold Bond,

No. M 1783

JOHN G. HOLMES,      40  
Treasurer.





Certificate  
for less  
than  
100 shares

Number  
102

# ALBEMARLE AND BRISTOL RAILROAD COMPANY

Incorporated under the laws of the State of Alabama.

Certificate  
for less  
than  
100 shares

Shares  
10

## TRUST CERTIFICATE.

*This Certificate is as hereinafter provided, and on surrender hereof*  
*George Ladd*

*will be entitled to receive a certificate or certificates for*  
*ten*  
*full-paid shares*

of \$100 each of the capital stock of Albemarle and Bristol Railroad Company and in the meantime to receive payments equal to the dividends, if any, collected by the undersigned Voting Trustees upon a like number of such shares standing in their names, less a proper share of the expenses of the Voting Trustees.

Until after the actual delivery of such certificates, the Voting Trustees shall possess, and shall be entitled to exercise, all rights and powers of owners of said stock, including the right to vote for every purpose and to consent to any corporate act of said Railroad Company, except as provided in the agreement, dated the 5th day of April, 1909, hereinafter referred to; it being expressly stipulated that no voting right passes by or under this certificate, or by or under any agreement, express or implied.

This certificate is issued pursuant to, and is subject to the terms and conditions of, a certain agreement dated the 5th day of April, 1909, signed by Norcross & Co., Robinson, Cromwell & Co., and Tracy Brothers, as Readjustment Managers, and the undersigned Voting Trustees, which agreement more fully defines the rights of the holder hereof, and the rights, duties and liabilities of the Voting Trustees.

No certificates of stock shall be deliverable hereunder before the 1st day of January, 1914, nor until the expiration of such further period, if any, as shall elapse before the said Railroad Company shall have paid for two consecutive years a four per cent. cash dividend on its stock. The Voting Trustees may, however, make delivery at any earlier date in their discretion, as provided in said agreement.

This certificate is transferable only on the books of the Voting Trustees by the registered holder, either in person or by attorney, upon surrender of this certificate properly indorsed, and according to the rules established by the Voting Trustees for the regulation of transfers; and until so transferred the Voting Trustees may treat the registered holder as owner hereof for all purposes whatsoever.

This certificate is not valid unless duly signed on behalf of the undersigned Voting Trustees by Norcross & Co., their agents, and also registered by Interborough Trust Company of New York as registrar of transfers.

In witness whereof the said Voting Trustees have caused this certificate to be signed by Norcross & Co., their duly authorized agents, this 6th day of April, 1909.

Registered: April 6, 1909.  
Interborough Trust Company of New York, Registrars of Transfers,  
By M. Kim, Assistant Secretary.

GEORGE A. NORCROSS,  
WILLIAM A. ROBINSON,  
EDWARD C. TRACY,  
Voting Trustees,  
by their Agents hereunder,  
NORCROSS & CO.

For value received\_\_\_\_\_ hereby sell, assign, and transfer unto

\_\_\_\_\_ the within  
certificate subject to the terms and conditions of the Voting Trust  
Agreement within referred to, and of all rules concerning such trans-  
fer which may from time to time or at any time be established by the  
within named Voting Trustees, to which agreement and rules the  
transferee and every holder hereof does assent by the acceptance  
hereof, and do appoint\_\_\_\_\_ attorney  
to transfer said certificate on the books of said Voting Trustees  
accordingly, with full power of substitution in the premises.

*Dated*\_\_\_\_\_ 19\_\_\_\_\_.

\_\_\_\_\_  
In presence of



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